86-908

No.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSELL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BERNARD KLEIMAN
Suite 1910
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, Pennsylvania 15222

GEORGE H. COHEN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

FREDERICK V. BETTS
PAUL D. CAREY
JAMES D. NELSON
BETTS, PATTERSON & MINES
1215 Fourth Avenue
Seattle, Washington 98164

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

1986 Opinion No. 124

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Boise, June 1986 Term

Filed: September 4, 1986

Frederick C. Lyon, Clerk

No. 15338

THARON RAWSON, individually and as Guardian ad Litem for her minor children, SETH RAWSON and CINDY RAWSON, heirs of JOHN P. RAWSON, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

BERNIECE JOHNSON, individually and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., minor children and heirs of GLEN RAYMOND ROSSITER,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

1986 OPINION NO. 30, ISSUED FEBRUARY 24, 1986, IS HEREBY WITHDRAWN AND THIS OPINION IS SUBSTITUTED THEREFOR

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. The Honorable Watt E. Prather, District Judge.

Appeal from an order granting summary judgment to the United Steelworkers of America in an action for

wrongful death. *Affirmed in part, reversed in part and remanded.*

Kenneth B. Howard, Jr., Coeur d'Alene, Idaho; Lloyd J. Webb, Twin Falls, Idaho; and Bruce O. Robinson, Bonners Ferry, Idaho, attorneys for the Appellant.

Margaret L. McMahon, Caldwell, Idaho; George H. Cohen, Washington D.C.; Robert M. Weinberg, James D. Nelson and Frederick V. Betts, Seattle, Washington, attorneys for the Respondent.

ON HEARING

HUNTLEY, J.

By this appeal, we are called upon to review a trial court's order granting summary judgment to the United Steelworkers of America (hereinafter referred to as U.S.W.A. or the Union) in an action brought by representatives of estates of four miners (hereinafter referred to as "the Miners") who lost their lives in the 1972 Sunshine Mine fire at Kellogg, Idaho, against the Steelworkers' Union on theories of negligence and fraud.

Judge Prather's memorandum opinion in support of his order granting the Steelworkers' Union's motion for summary judgment of dismissal of the complaint stated his conclusions:

(1) That the U.S.W.A. was entitled to summary judgment on the Miners' fraud claims;

(2) That the U.S.W.A. was entitled to summary judgment on the Miners' negligence claims; and

(3) That the record established that the Miners' claims related exclusively to the manner in which the U.S.W.A. exercised its authority as collective bargaining representative of the employees at the Sunshine Mine and, hence, that this Court should again consider the issue of whether the Miners' claims are preempted under federal labor law.

We affirm the order of summary judgment as to the fraud claim. However, for reasons discussed *infra*, we reverse the order of summary judgment as to the negligence claim and remand for further proceedings.

I. THE FRAUD CLAIM

The amended complaints allege that the U.S.W.A. made the following representations to its members at the Sunshine Mine:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had a concern for said welfare, safety and interest of its members.

B. That it had a reliable degree of expertise in underground mining.

C. That it would develop adequate programs of safety through its Union representatives for the benefit of its members, the rank-and-file of said Union.

D. That it would provide competent Union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the Union contract with the Sunshine Mine with regard to safety and accident prevention.

The complaints allege that the above representations were false, that they were relied upon by the employees, and that they were a proximate cause of appellants' decedents' death.

The Miners' brief does not specify whether their claim is one of actual fraud or constructive fraud. However, a party asserting a cause of action based on fraudulent misrepresentation must prove each of the following elements: a representation; its falsity; its materiality; the

speaker's knowledge of its falsity or ignorance of its truth; the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; the hearer's ignorance of its falsity, reliance on its truth, right to rely thereon, and consequent and proximate injury. Smith v. King, 100 Idaho 331, 597 P.2d 217 (1979).

In an action to prove actual fraud, the claimant must prove that the other party acted with an intent to deceive. Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769 (1977). In a case of constructive fraud, that element is not required. State v. Hightower, 101 Idaho 749, 620 P.2d 783 (1980); Bethlamy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); McGhee v. McGhee, 82 Idaho 367, 353 P.2d 760 (1960).

Summary judgment should be granted only when the pleadings, depositions and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact. The facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982).

The record reflects that the U.S.W.A. submitted evidence establishing that it did not represent to the Miners that it had expertise in mine safety or that it could ensure a safe work place. Respondents failed to present evidence contradicting the U.S.W.A.'s showing. When a motion for summary judgment is made and supported by affidavit, an opposing party may not rest upon his pleadings, but must respond by affidavit, deposition or interrogatory setting forth specific facts showing there is a genuine issue for trial. As the trial court observed in its decision granting the Union's motion for summary judgment on the fraud claim:

> The record is . . . bereft of evidence the defendant Union made misrepresentations of fact or that the defendant intended to defraud plaintiffs. On the other hand, the defendant has submitted testimony that the Union did not misrepresent its expertise; the Union members were aware the Union only acted in an advisory capacity and that the primary responsibility for ensuring job safety lay with each individual Union member and the company.

Since the record reflects that appellants relied only on their pleadings and did not produce the necessary documentation to show that there was a genuine issue for trial, the trial court did not err in granting the motion for summary judgment on the fraud claim.

II. THE NEGLIGENCE CLAIM

The trial court also granted the Union's motion for summary judgment of dismissal on the Miners' negligence claim. The court concluded that the Miners' had not established that the Union owed a duty to the deceased miners. The trial court's memorandum opinion in support of its order granting the motion for summary judgment on the negligence claims reads:

> Plaintiffs seek to hold the Union responsible on negligence theories. A fundamental component of a negligence claim is the existence of a duty toward another. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975). A duty is a standard of conduct to which the defendant is required to conform. *Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). Plaintiffs rely on the collective bargaining agreement and RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A (1965), as the sources for the legal duty owed by defendant Steelworkers.
>
> A breach of contract is not in and of itself a tort. A contract may, however, create a situation which

furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of care in the performance of those services. "The duty of care arises . . . irrespective of contract," and "[t]here must be a breach of duty apart from the non-performance of a contract." *Taylor v. Herbold*, 94 Idaho 133, 484 P.2d 664 (1971). Mere failure to carry out contractual obligations cannot support a tort action while misfeasance in the performance of contract obligations may support a tort action.

Plaintiffs complain the Union "failed to develop an adequate program for inspection and for safety, . . . failed to inspect," and "failed to require other safety devices to be used." Clearly the plaintiffs are upset with what the Union did not do, not with what it did do. Non-performance of alleged contractual duties will not sustain a tort claim.

The "Good Samaritan Doctrine" is enunciated in RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A. Section 324A reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for the physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> (A) his failure to exercise reasonable care increases the risk of such harm, or
>
> (B) he has undertaken to perform a duty owed by the other to the third person, or
>
> (C) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Section 323 is substantially the same as 324A except it deals with the situation where an individual undertakes to render services directly to another person.

We start with the premise there is no duty to be a good Samaritan. The law will only hold a defendant liable if the plaintiff can meet the criteria laid down by the RESTATEMENT. This Court has already held there is no proof the plaintiffs' decedents relied on the Union's safety activities. Therefore, the third possible criteria, that the harm is suffered because of reliance of the third person upon the undertaking, is not satisfied. Neither has the first criteria, i.e., the failure to exercise reasonable care increased the risk of harm, been met.

In *Clemente v. United States*, 567 F.2d (1st Cir. 1978), the plaintiffs sued over the death of Roberto Clemente and two other passengers and crewmen in a private airplane crash. The plaintiffs alleged Federal Aviation Administration employees had acted negligently in failing to warn Clemente and other passengers the airplane was overweight and lacked a proper flight crew. The FAA had promulgated an internal order saying, "clear indication of alleged illegal flights should be made known to flight crew and persons chartering the service."

The appeals court held the defendant United States could not be held liable on the Good Samaritan theory.

> While the Federal Aviation Act empowered the administrative staff on the FAA to issue an order such as SO8430.20C, the Act itself does not require this conduct. The agency, in issuing the order, was acting entirely gratuitously and was under no obligation or duty to plaintiffs' decedents or any other passengers.
>
> [T]he *Restatement of Torts (Second)*, §§ 323 and 324a n makes it clear that liability in such

> a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from his reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm. . . . There was no underlying statutory duty to offer a special protection to plaintiffs' decedents; the failure to inspect *in no way added to the risk* of injury to the passengers or crew; and there is no evidence that anyone relied on the contents of SO8430.20C and limited their own safety precautions accordingly. (emphasis supplied).

Like *Clemente*, the Union's alleged failure to inspect, warn and make safe did not increase the danger to the miners beyond that under which they were operating. The Steelworkers may not have helped the miners' safety problems, but they did not augment them either. See also *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978). The Court notes the case at bar is also akin to the *Clemente* case in that there is no evidence the rank-and-file Union members limited their own safety precautions because of Union activities.

Lastly, the defendant did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly placed the responsibility for making the work place safe upon Sunshine Mine.

> The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. . . .
>
> . . . Advice of the safety committee, together with supporting suggestions, recommendations

> and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent *with the company's responsibility to provide for the safety and health of its employees* during the working hours of their employment and the mutual objectives set forth in section 1. (emphasis supplied).

> The collective bargaining agreement makes it very clear that the primary responsibility for the rank-and-file members' safety and health was placed upon the company as opposed to the Union which could only act in an advisory capacity. The Union could talk all it wanted to but when it came right down to it, the Union was without authority to force any safety and health measure upon the company except in highly limited, and for our purposes here, irrelevant circumstances. Herein lies the central factor in this dispute. The technical requirements of the RESTATEMENT aside, it is fundamentally unfair to hold a party liable for a condition it did not create or worsen and which it had no jurisdiction to correct. Summary judgment is granted dismissing all of plaintiffs' negligence claims.

The memorandum decision of the learned trial court is well-reasoned but proceeds from a faulty focus in several respects: First, the trial court embarks upon a lengthy analysis of whether the Miners' claim meets the requirements of Restatement of Torts (2d), Sections 323 and 324A, which he characterizes as the "Good Samaritan Doctrine." From there, the court reasons plaintiffs' cause fails because non-performance (as distinguished from misfeasance) will not support a tort action, the trial court stating:

> "Clearly, the plaintiffs are upset with what the Union did not do, not with what they did do."

Both premises are incorrect. The record establishes that the Union's safety undertaking was not the act of a "Good Samaritan" but was, in fact, a substantial part of the Union's offering in consideration of the workers' membership and payment of dues. The Collective Bargaining Agreement provided for the Union's safety inspection function, which service was bought and paid for by union dues. In any event, it provides an incorrect focus to view and interpret Sections 323 and 324A under the rationale of the Good Samaritan Doctrine—the Restatement does not so characterize those sections and their specific language includes the rendering of services "for consideration." In this regard, the address of I.W. Abel, President of the U.S.W.A., in his November address to the delegates to the "International Conference of Safety and Health of the Steelworkers' (Appendix A hereto), is instructive. Moreover, the characterization of the Miners' claim as one for mere nonfeasance which did not increase the risk of harm is incorrect. As the analysis below will demonstrate, the Union, through its representatives, did embark upon safety inspections, and the issue is whether they negligently performed their undertaking, or whether the Union's negligent performance resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion that would otherwise have been the situation had the inspections been performed without negligence.

As its second premise for its dismissal of the negligence cause the trial court opens:

> Lastly, the defendant [USWA] did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly placed the responsibility for making the work place safe upon Sunshine mine.

However, a more detailed exposition below will demonstrate the Miners' cause is not premised on either a claim that the Union should perform management's safety func-

tions or that the Union should make the workplace safe—rather, the cause of action is premised upon the Union negligently performing those safety functions which it did, in fact, undertake.

Recently, in Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), this Court ruled that mere nonfeasance, even if it amounted to willful neglect to perform a contract, is insufficient to establish duty in tort. In *Carroll*, a Union member accused his Union of failing to perform protective actions relative to conducting safety inspections at the work site, but did not allege negligent performance of those actions once undertaken. In *Carroll*, no inspections were made. In the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee *failed* to inspect, but that they actually performed the duty of inspection in a negligent manner and failed to report what should have been obvious safety problems, the duty to report necessarily flowing from the act of inspection. Hence, the instant case does not present a situation of non-feasance, but of malfeasance.

The Miners assert that the basis of a negligent undertaking is established in this case under *both* the collective bargaining agreement and the Constitution of the Union. The Constitution of the International Union and of the Local Union provided in pertinent part:

> Object . . . to establish through collective bargaining adequate wage standards, shorter hours of work, and improvements in the conditions of employment for workers and industry.
>
> . . .
>
> A safety and health committee under the direction of the International Union or its designated representative, shall be established in each Local Union.

At the time of the fire, there existed a collective bargaining agreement between the Union and the Sunshine Mining Company, dated March 11, 1970, which provided in Article 9, Section 1, the following:

> The Company and the Union will continue to operate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.
>
> An employee who believes that he is being required to work under conditons [sic] which are unsafe beyond the nornmal [sic] hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.
>
> In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling,

and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exrcises [sic] his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the Plant Manager for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.

> A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.
>
> Two men shall be designated by the Union to accompany the Safety Engineer on the tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The result of this tour shall be considered at the following Union-Management safety committee meeting.
>
> In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the greivance [sic] procedure.

Affidavits established that a health and safety committee was formed. As a matter of practice within the Union, the committee members of the health and safety committee required by the constitution were also members of the joint safety committee required under the collective bargaining agreement. The Miners assert that since the inspections and recommendations regarding practices and rules were services to be performed by the Union for the benefit of its member miners, the Union had a duty to use due care in performing these services.

The Restatement (Second) of Torts, § 323 (1977) states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm.

(b) the harm is suffered because of the other's reliance upon the undertaking.

The Miners assert that evidence was presented to establish the following:

(1) John Rawson, Glen Rossiter, Wayne Johnson and Don Wood did not have the use of self-rescuers (oxygen masks and cannisters);

(2) Self-rescuers were stored in boxes with padlocks;

(3) Some of the self-rescuers were eighteen years of age and were corroded so that the valve could not be turned to operate them;

(4) Some of the self-rescuers were inoperative and others were used by miners who sensed them getting hot and discarded them not knowing that the development of heat was an indication that the self-rescuer was working;

(5) The miners did not know how to use self-rescuers that may have been available and had not been trained in their use;

(6) No self-rescuers were stored at the 5,400 level where John Rawson and Glen Rossiter were stationed; at other levels there were fewer cannisters than the usual number of men working at those levels; and that there were only six units at the major escape route at the 3,100 foot level.

(7) There were no periodic fire drills or evacuation drills for miners working underground;

(8) There were no opportunities for the miners under controlled circumstances to become familiar with proper exit procedures and sequences; and

(9) There were no periodic checks or tests made of a stench warning system and many of the survivers testi-

fied to facts permitting the inference that the system did not work.

(10) Evidence exists that the fire was started by spontaneous combustion in a pile of accumulated rubbish.

The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies. A reasonable inference which the trial court should have drawn in favor of the miners is that the inspecting personnel were negligent in not seeing and reporting some of those conditions. We cannot say as a matter of law that had the inspectors reported these blatant violations to the committee, with the committee in turn reporting them to management, that management would have corrected these defects—but neither was the trial court correct on summary judgment to resolve that factual issue the other way. Rather, such is an issue of proximate cause not properly resolved on summary judgment. The record is devoid of any opposing affidavits or deposition testimony that the inspections were, in fact, conducted in a reasonable and prudent manner in accordance with recognized standards.

Construing the facts and the inferences most favorably toward the parties against whom summary judgment is sought, and absent a record establishing that management had no concern for safety, the reasonable inference would be that management would have acted responsibly had these matters been brought to its attention.

In light of the above record, we cannot conclude as a matter of law that the Union owed no duty to exercise due care in performance of the inspections once its personnel undertook them. Moreover, we cannot conclude as a matter of law that the Union owed no duty to bring to the attention of the members of the safety committee

the safety problems that existed in the Sunshine Mine. Because the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and, *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection. For this reason, we reverse the trial court's order granting the Union's motion for summary judgment of dismissal as to the negligence claims.

III. THE PREEMPTION ISSUE

In Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), which case arose out of the same facts as the instant appeal, this Court held on remand that material issues remained regarding whether the Union had a duty to inspect and whether it breached that duty. In *Dunbar*, the question of the existence of a duty was never reached since the trial court held that the cause of action was preempted by the federal duty of fair representation. Justice Bakes, specially concurring in Part I of *Dunbar*, wrote:

> I concur with the majority's ruling that the trial court erred in dismissing the appellants' wrongful death action against respondent United Steelworkers because of the preemption doctrine. An action for wrongful death is a creature of our state statutes, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. Assertion of jurisdiction by the courts of this state over the appellants' action would appear to present no significant risk of undue interference with national labor policy. 100 Idaho at 546-547; 602 P.2d at 44-45.

No provision of the National Labor Relations Act provides that it is federal policy to immunize labor unions from responding in tort for their negligent acts. In Brown v. Hotel & Restaurant Employees & Bartenders, 468 U.S. ——, 104 S.Ct. 3179, 82 L.Ed.2d 373 (1984) the court noted:

> The National Labor Relations Act . . . leaves much to the state, though congress has refrained from telling us how much.

The Union argues that *all* relationships between a union and its members flowing from a collective bargaining agreement are preempted, with the union's duty being only that of "fair representation." This leads to some rather fuzzy analysis. "Preempt" is defined as "to seize upon to the exclusion of others," Webster 3d Int'l Dictionary. Although the NLRB has been given exclusive jurisdiction to regulate and interpret collective bargaining agreements as to ongoing performance and modification, the NLRB has not been given (nor has it seized) the function of considering tort damages for wrongful death for past union misfeasance. We remain of the view expressed by the majority of this court in *Dunbar*, 100 Idaho at 527.

> We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, i.e., if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

Recently in Allis-Chalmers Corp., Petitioner v. Roderick S. Lueck, 53 USLW 4463 (April 16, 1985) the United States Supreme Court held that when resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law. In *Allis-Chalmers*, the United States Supreme Court reversed a Wisconsin Supreme Court decision which had held that a claim that a Union had handled an insurance claim in bad faith was not pre-empted because under Wisconsin law the tort of bad faith is distinguishable from a bad-faith breach-of-contract claim, and that although a breach of duty is imposed as a consequence of the relationship established by contract, it is independent from that contract. In reversing the Wisconsin decision, the United States Supreme Court concluded that the right asserted by the Union member was rooted in contract, and the bad-faith claim could have been pleaded as a contract claim under § 301. The Court concluded that unless federal law governed that claim, the meaning of the disability-benefit provisions of the collective bargaining agreement would be subject to varying interpretations, and the congressional goal of a unified body of labor-contract law would be subverted. The *Allis-Chalmers* Court stated, "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation. . . . These questions of contract interpretation, therefore, underlie any finding of tort liability, regardless of the fact that the state court may chose to define the tort as 'independent' of any contract question. Congress has mandated that federal law govern the meaning given contract terms. Since the state tort purports to give life to these terms in a different environment, it is preempted." 53 USLW at 4467. In the instant case, however, we need not interpret a contract. The appellants

are suing for breach of a duty to inspect and report under the reasonable and prudent person standard.

Both the Union, on appeal, and the trial court, in its memorandum decision, urge this Court to reconsider its holding in *Dunbar*. The trial court stated:

> This case does not involve a collective bargaining agreement whereby the Union assumed management safety responsibilities and therefore management's common law duties. In Helton v. Hake, 564 S.W.2d 313 (Mo. 1978), the collective bargaining agreement provided the Union steward would ensure no work was done in the immediate area of high tension lines. The agreement distinctly said the employer was in no way responsible for the performance of these safety functions by the steward.
>
> . . .
>
> . . . When the Union takes actual authority for enforcing safety conditions on the work site away from management, it should be held responsible for breaches in a duty of care just as management would have been at common law. The defendant Union's collective bargaining agreement with Sunshine did not allow the Union to enforce safety measures. The Sunshine/Steelworkers' contract did say the Union "shall inspect," but the Union could do nothing but advise once it had been reported.

While the trial court concluded that *Helton* supported the Union's position, in fact it supports that of the Miners. In *Helton*, the Missouri court stated:

> The complaint alleges that the union, through its agent, the steward, negligently and carelessly failed to enforce the safety rule relating to work in the area of high tension power lines. The suit is clearly

> brought as an action in tort seeking recovery for wrongful death due to the alleged negligence of the defendants. The only relevance of the collective bargaining agreement appears to be that it would determine, to some extent at least, the nature and scope of defendants' duty. 564 S.W.2d at 318.

Likewise, in the instant case, the provisions of the collective bargaining agreement do not require interpretation, as was the case in *Allis-Chalmers, supra*, but rather the provisions determine only the nature and scope of the Union's duty. The trial court acknowledges that the Union had a duty to "advise;" and it is *that* duty which appellants contend was breached. Whether the Union breached the duty, and whether such breach, if established, was the actual or proximate cause of the appellants' decedents' deaths, are not issues addressed by this appeal. Our narrow holding today is that the Union, having inspected, assumed a duty to use due care in inspecting and, from the duty to use due care in inspecting arose further duty to advise the committee of any safety problems the inspection revealed. Moreover, since an action for wrongful death is a creature of our Idaho statute, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state, and because the instant action does not require an interpretation of the terms of the collective bargaining agreement, we do not consider it to be preempted by federal law.

In Hechler v. Intern. Broth. of Elec. Workers, AFL-CIO, 772 F.2d 788 (11th Cir. 1985) the court correctly analyzed the non-applicability of the preemption doctrine to cases of this nature.[1]

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[1] The *Hechler* court blinked and waffled shamefully by its final qualifying paragraph:

> We emphasize at this point the narrow scope of our holding. . . . This case is distinguishable from [earlier cases] in

In *Hechler*, the court the employee's state law action does not run afoul of the recent pronouncement in Allis-Chalmers Corp. v. Lueck, in which the Court found preempted a state action for bad-faith handling of an insurance claim arising out of a disability insurance plan included in a collective bargaining agreement. The tort in that case was essentially a product of the labor contract itself—without the contract, no tort claim could have existed. In this case, the claim is essentially one of common law negligence for breach of a duty of care. Liability will turn on basic negligence principles as developed by state law.

A union breaches its duty of fair representation only when it treats an individual in an arbitrary, discriminatory, or bad faith manner. Vaca v. Sipes, 386 U.S. 171 (1967). Two key issues must be addressed to determine whether a common law negligence action is preempted by the federal remedy for breach of such a duty.

> *First*, a court must determine whether the duty the union allegedly breached is so inextricably intertwined with the collective bargaining agreement that only a duty of fair representation claim is available. *Second*, in making this determination, the court must be aware of federal labor law policy and whether a negligence action against a union impermissibly impedes upon the federal labor-management regulatory scheme.

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which the plaintiff sought relief from the union for a breach of its general duty to inspect for safety and for the benefit of the entire work force in the work place pursuant to the collective bargaining agreement. In [this] case, the plaintiff alleges a duty running from the union to her individually that required [it] to assure that she was first qualified to work in a dangerous electrical substation on the job assigned to her prior to her assignment. 772 F.2d at 797-798.

> With regard to the later concern, the primary inquiry is whether the duty sought to be enforced against the union . . . is so tangential . . . to the federal scheme that the [action] is properly exempted from the [general] preemption rule. [B]alancing of the relevant factors leads [to a conclusion] that [the employee's] negligence claim is not preempted. *Hechler*, 772 F.2d at 796.

The union's duty of fair representation does not displace those duties created by state law that prohibit a person or corporation from engaging in tortious conduct resulting in death or injury.

> [N]othing in the [federal] statutory scheme expressly addresses such conduct or provides a mechanism for its redress. Likewise, it cannot be said that by failing expressly to [address] acts of negligence by unions, Congress intended to permit unions to engage in such acts free of the scrutiny of state courts. *Hechler*, 772 F.2d at 796-97.

> Nor is the union's contractual duty to assure worker training . . . inextricably intertwined with its federal duty of providing fair representation. . . . [T]he fact that . . . reference to a collective bargaining agreement must be made in order to define the scope of the . . . duty does not [mean that a negligence action is] no more than a [preempted] § 301 action.

> [E]ven if the state action threatens adjudication of matter cognizable by the [National Labor Relations] [B]oard or by a court adjudicating federal labor law, the extent of that threat [must be balanced] against the importance of the action to the state. [N]o impermissible conflict . . . [e]xists in this case. *Hechler*, 772 F.2d at 797.

We agree with the *Hechler* analysis. Counsel for the union advises that the Supreme Court of the United

States entered an order on May 19, 1986, granting review of *Hechler* and urged that if we reverse and remand, we should, in the interest of judicial economy, direct stay of proceedings until the Supreme Court acts. Since this cause of action arose fourteen years ago, and since the parties have not had a hearing on the merits of such a proposal, we decline to direct a stay without prejudice to the right of either party to assert the request before the trial court.

Affirmed as to the fraud claim, reversed as to the negligence claim and remanded to the trial court for further proceedings consistent with this opinion.

Costs to appellants. No attorney fees.

BISTLINE, J. concurs.

DONALDSON, C.J. concurs in the result.

SHEPARD, J. dissenting.

I concur in Part I of the majority opinion wherein it affirms the trial court's issuance of summary judgment relating to the fraud claim. I also concur in Part III of the majority opinion wherein it holds that the instant action is not preempted by federal law. I dissent from Part II of the majority opinion wherein it reverses the trial court's issuance of summary judgment on the negligence claim.

Less than two years ago this Court, with only Bistline, J. dissenting, affirmed a summary judgment granted to the United Steelworkers of America as defendant in an identical case. In *Carroll*, plaintiff was a mine worker in the same mining district as that in the instant case. In *Carroll* the same collective bargaining agreement existed between the same union and a company employer. Carroll was injured while working in the mine. Carroll was a member and brought action against the United Steel Workers of America. In *Carroll*, as here, it was

asserted that the union owed a duty to Carroll since Carroll was the third-party beneficiary of the contract between the union and the employer.

I find the facts and the holding of *Carroll* indistinguishable from the present case. In *Carroll* the Court stated:

> "Under Idaho law it is settled that an alleged failure to perform a contractual obligation is not actionable in tort. . . . Mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is insufficient to establish a duty in tort. . . . Consequently, Carroll's cause of action, if any, arising from the Collective Bargaining Agreement lies only in contract, not in tort."

In support of that holding, the *Carroll* Court discussed House v. Mine Safety Appliances Company, 417 F.Supp. 939 (1976), stating:

> "Judge Anderson, in dicta, discussed public policy considerations which relate to the issue of imposing tort liability on the basis of a collective bargaining agreement. . . . To impose liability on the union in a case such as this is against public policy and would seriously disrupt labor relations policy."

Bistline, J. dissented in *Carroll*, and his position in the instant case is consistent. I cannot, however, fathom the reasoning of the two members of the Court. If *Carroll* was wrong, it should be overruled. I view as sophistry any attempt to distinguish *Carroll* on the basis that *Carroll* involved a total failure of duty, while the instant case involves only a partial failure of duty. If such be a distinction, it is merely one without a difference.

Lastly, it is to be noted that the defendant United Steelworkers of America, is an unincorporated association. Plaintiff is a member of that unincorporated association. Presumably the union has no existence, cor-

porate or otherwise, separate and apart from its members, and does not constitute a separate entity. The question of how the plaintiff, along with others as members of a nonincorporated association, can owe a duty to himself is not discussed, nor the implications of a breach of that duty which presumably plaintiff, along with others, had an alleged obligation to perform.

BAKES, J., dissenting:

For the reasons set out below, I would affirm the decision of the district court granting summary judgment in favor of the respondent United Steelworkers of America.

I

I believe that this action is preempted by federal law. When this case was before this Court previously in Dunbar et al. v. United Steelworkers of America et al., 100 Idaho 523, 602 P.2d 21 (1979), I then wrote that the preemption issue should not be decided on a motion to dismiss, as had been in that case, but that it should "await a full factual development of the legal issues raised under our state tort law." After the Court in *Dunbar* remanded the case to the district court for further proceedings, extensive discovery was conducted, resulting in a more complete factual evaluation of the plaintiffs' claims. Also, in the interim the United States Supreme Court had again spoken, I believe definitively, in the case of Allis Chalmers Corp. v. Lueck, —— U.S. ——, 105 S.Ct. 1904 (1985). Based upon that record, I now believe that federal law requires us to affirm the decision of the district court.

In Allis Chalmers Corp. v. Lueck, *supra*, the Supreme Court determined that Section 301(a) of the Labor Management Relations Act of 1947, 27 U.S.C. § 185(a), requires state courts to apply federal law when resolving a state tort claim which is substantially dependent upon

analysis of the terms of the collective bargaining agreement. In order to understand the Court's decision in *Allis Chalmers*, it is necessary to understand Section 301(a) of the Labor Management Relations Act of 1947.

Section 301(a) states:

> "Suits for violation of contracts between an employer and the labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a).

Although on its face Section 301(a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts, the statute's import has been extensively analyzed by the United States Supreme Court. In Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S.Ct. 519 (1962), the Court recognized that in enacting Section 301(a) Congress intended that both state and federal courts have concurrent jurisdiction over contracts made by labor organizations. In exercising this concurrent jurisdiction, the federal courts are authorized to fashion a body of federal law for the enforcement of such agreements. Textile Workers v. Lincoln Mills, 353 U.S. 448, 457, 77 S.Ct. 912, 918 (1957). The application of state law is preempted because uniformity in this area of the law is particularly important since,

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions

> in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04, 82 S.Ct. 571, 577 (1962) (footnote omitted).

Thus, "[i]n enacting Section 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." Teamsters v. Lucas Flour, 369 U.S. at 104, 82 S.Ct. at 577 (1962).

Section 301 preemption, which gives the state concurrent jurisdiction but mandates that the state courts apply federal substantive law, is distinct from the sort of preemption discussed in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773 (1959), and its progeny. *Garmon* preemption is concerned with protecting the primary jurisdiction of the National Labor Relations Board. San Diego Building Trades Council v. Garmon, *supra*. *See also* Allis Chalmers Corp. v. Lueck, —— U.S. ——, ——, 105 S.Ct. 1904, 1912-13, n. 9 (1985); Brown v. Hotel & Restaurant Employees & Bartenders, —— U.S. ——, ——, 104 S.Ct. 3179, 3186 (1985). Section 301 preemption does not stem from concern for the National Labor Relations Board's primary jurisdiction. Rather, Section 301 preemption reflects Congress's concern that collective bargaining agreements be interpreted under a uniform federal labor law.

Stressing this need for uniformity, the Court in the recent *Allis Chalmers* decision extended the preemptive

effect of Section 301 beyond suits merely alleging contract violations. The court stated:

> "Questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, *whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.* Any other result would elevate form over substance and allow parties to evade the requirements of Section 301 by relabeling their contract claims as claims for tortious breach of contract." Allis Chalmers v. Lueck, —— U.S. at ——, 105 S.Ct. at ——. (Emphasis added.)

The Court's extension of Section 301 is not surprising given the close relationship between contract actions and tort actions arising out of contract. *See generally* Prosser & Keeton, The Law of Torts, §§ 92, 93 (1984).

In determining whether Section 301(a) applies to a tort claim, the focus is on "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state's tort law purports to define the meaning of the contract relationship, that law is preempted." Allis Chalmers v. Lueck, —— U.S. at ——, 105 S.Ct. at 1912. The characterization of an action as a tort action is not sufficient to avoid preemption under Section 301(a).

Application of the preemption test articulated in *Allis Chalmers* to the facts of the wrongful death action now before this Court is complicated by limiting language[1]

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[1] In Allis Chalmers v. Lueck, —— U.S. ——, 105 S.Ct. 1904 (1985), the Court noted: "It is perhaps worth emphasizing the narrow focus of the conclusion we reach today. We pass no judgment on whether the suit also would have been preempted by other federal laws governing employment or benefit plans. Nor do we hold that every state lawsuit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more

in *Allis Chalmers*. However, considering the specific facts set forth in *Allis Chalmers*, I can find no basis for distinguishing *Allis Chalmers* from the case at bar.

In *Allis Chalmers*, the Wisconsin Supreme Court had determined that the plaintiff's action for bad faith handling of an insurance claim, arising from a claim made under a disability plan included in a collective bargaining agreement, was not preempted. The Wisconsin court's conclusion was based upon application of the balancing test enunciated in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 245, 79 S.Ct. 773, —— (1959). Using the *Garmon* analysis, the Wisconsin court held that the administration of disability claim procedures under collective bargaining agreements was only of peripheral concern to federal labor law, but that the bad faith insurance tort was of substantial significance to the State of Wisconsin. This analysis was rejected by the Supreme Court. The Court stated:

> "So called *Garmon* preemption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests. The present tort suit would allow the state to provide a rule of decision where Congress has mandated that federal law should govern. In this situation, the balancing of state and federal interests required by *Garmon* preemption is irrelevant, since Congress, acting within its power under the commerce clause,

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generally to the parties to such an agreement, necessarily is preempted by Section 301. The full scope of the preemptive effect of federal labor contract law remains to be fleshed out on a case by case basis. We do hold that when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a Section 301 claim, *see* Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968), or dismissed as preempted by federal labor contract law."

has provided that federal law must prevail." Allis Chalmers v. Lueck, —— U.S. ——, n. 9.

The *Garmon*-type analysis is simply not applicable if the asserted claim is "inextricably intertwined with consideration of the terms of the labor contract." If the asserted claim is "inextricably intertwined with consideration of the terms of the labor contract," Section 301 mandates that federal substantive law be applied.

In our prior decision in Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), which was decided prior to *Allis Chalmers*, the Court addressed only the question of whether this action is preempted because it would infringe upon the primary jurisdiction of the National Labor Relations Board. The Court today continues to adhere to the views expressed in *Dunbar* insofar as the *Garmon* preemption analysis may be applied to claims unrelated to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from that agreement. However, in *Dunbar* we did not consider whether the Section 301 preemption of *Allis Chalmers*, which requires that our state courts apply uniform federal law, applies in this wrongful death action. If this wrongful death action is "inextricably intertwined with consideration of the terms of the labor contract," as was the bad faith tort alleged in *Allis Chalmers*, we must apply federal substantive law as mandated by Section 301(a).

Having fully considered the record, I conclude that Section 301(a) applies here. Any duty which the union owed to its members, and which might form the basis of the plaintiffs' negligence claims, arose through the terms of the collective bargaining agreement. It was the collective bargaining agreement which provided for the formation and membership of the Safety Committee and set forth the duties of the Safety Committee. Whether the terms of the collective bargaining agreement imposed

a duty on the union or merely gave the union the right to participate in the selection of the safety committee is a question "inextricably intertwined with consideration of the terms of the labor contract."

The majority's attempt to characterize the duty that the union owed to its members as arising from the union's constitution and the actions of the union's officers toward its members are unpersuasive. Through the negotiation process, the union and the company worked out the collective bargaining agreement which not only outlined the union's responsibilities in regard to the Safety Committee, but also limited the union's right to interfere in the operation of the mine. Any duty which the union had to its members to preserve safe conditions within the mine could only be fulfilled through the terms of the collective bargaining agreement. Thus, because consideration of issues related to the union's duty is inextricably intertwined with consideration of the collective bargaining agreement, we cannot ignore the Supreme Court's mandate. The plaintiffs' negligence claim must be treated as a Section 301 claim, and federal law applied.

A survey of federal law indicates that the only duty which the union owes to its members under federal law is the duty of fair representation.[2] The duty of fair representation is breached only when the conduct of the

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[2] In Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), we recognized that other duties may arise under state law. Quoting from Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), we reiterated the view that there is

> "no authority . . . which insulates a union for its negligence and tortious conduct toward one of its members, *i.e.*, if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment with the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation."

union is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 190, ——, 87 S.Ct. 903, 916 (1967); Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363 (1964). Due care has not been incorporated into the union's duty of fair representation. Mere negligence does not generally constitute a breach of the union's duty of fair representation. Condon v. Local 2944, United Steelworkers, 683 F.2d 590 (1st Cir. 1982). Dente v. International Organization of Masters, Mates & Pilots, Local 90, 492 F.2d 10 (9th Cir. 1973). Since the plaintiffs here have not alleged that the union's conduct was arbitrary, discriminatory, or in bad faith, the appellants have not made out a cause of action. Accordingly, the district court was correct in granting the union's motion for summary judgment with respect to the negligence issues.[3]

II

Even if state tort law, rather than federal law, applied, the majority's analysis of the negligence issues under state tort law and its effort to distinguish our recent case of Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), is difficult to comprehend. That case involved a substantially similar contract and substantially similar facts. The majority attempts to distinguish this case from *Carroll* stating that in *Carroll* the safety committee failed to perform protective actions, but that

> "in the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee failed to inspect but that they actually performed the duty of inspection in a negligent manner and failed to report what should have been obvious safety

[3] Where an order of a lower court is correct, albeit based on a different theory than that found to be dispositive by the Supreme Court, the lower court order will be affirmed. Sheppard v. Sheppard, 104 Idaho 1, 7, 655 P.2d 895, —— (1982).

> problems, the duty to report necessarily flowing from the act of inspection. Hence, the instant case does not present a situation of non-feasance but one of malfeasance."

Without stating it, the majority is applying a *respondeat superior* doctrine to the union for the alleged malfeasance of a safety committee, only some members of which they had the responsibility of appointing. The majority has failed to recognize that the union, and the safety committee which failed to inspect or inspected in a negligent manner, are not one and the same. Rather, under the collective bargaining agreement, as the majority points out, the union was to appoint three members of the safety committee, and management was to appoint three members of the committee. For all that this record shows, the union did perform its contractual obligation and did appoint its members to the safety committee, as did management. However, the safety committee was not the *alter ego* of the union, nor is there anything in the record from which a triable issue of fact arises concerning whether or not the union had a right to direct the manner in which the safety committee carried out its inspections. The majority opinion merely assumes that any negligence of the safety committee, which was composed of both management and union designees, was, perforce, misconduct of the union and thus actionable. The majority assumes *respondeat superior* liability on behalf of the union for an organization which the record does not reflect it had any authority to control. This is clearly reflected in its opinion, *ante* at 15, when it states, "In light of the above record, we cannot conclude as a matter of law that the Union owed no duty to exercise due care in performance of the inspections once its personnel undertook them." However, those personnel were members of a committee composed of both management and labor representatives. The majority does not even discuss, much less support in the record and by authorities, the proposition that the union, which appointed repre-

sentatives to the safety committee pursuant to provisions of the collective bargaining agreement, would then be responsible if one of its appointees did not exercise due care in performing the safety committee's inspection function. The appellants have not pointed out any such facts or law to support *respondeat superior* liability under those circumstances and, accordingly, the district court's judgment should be affirmed on that issue.

Furthermore, the majority opinion states, *ante* at 15, "Moreover, we cannot conclude as a matter of law that the Union owed no duty to bring to the attention of the members of the safety committee the safety problems that existed in the Sunshine Mine." However, there is nothing in the record to suggest that, apart from the knowledge gained by those appointees to the safety committee who may have conducted inspections, the "union" ever had any knowledge of safety problems that existed in the Sunshine Mine.

Finally, the majority states, *ante* at 15, that "[b]ecause the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and, in fact inspected the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection." Again, the collective bargaining agreement did not impose upon the union a duty to inspect the mine, but merely to appoint representatives to the safety committee who, along with the management representatives, would inspect the mine. The union carried out its responsibility under the collective bargaining agreement by appointing the members. However, assuming that the appointees negligently carried out their responsibilities, there is no showing in fact or law that the union is responsible for their conduct under a *respondeat superior* theory. The majority is plainly incorrect when it concludes that, under the provisions of the collective bargaining agreement, the union "had contracted to inspect and, in fact inspected the mine . . . ." Accordingly, I believe the summary judgment granted by trial court should be affirmed.

APPENDIX B

1986 Opinion No. 30

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Boise, April 1985 Term

Filed: February 24, 1986

Frederick C. Lyon, Clerk

No. 15338

THARON RAWSON, individually and as Guardian ad Litem for her minor children, SETH RAWSON and CINDY RAWSON, heirs of JOHN P. RAWSON, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

BERNIECE JOHNSON, individually and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., minor heirs of GLEN RAYMOND ROSSITER,

Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA, an unincorporated association,

Defendant-Respondent.

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,

Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA, an unincorporated association,

Defendant-Respondent.

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Honorable Watt E. Prather, District Judge.

Appeal from an order granting summary judgment to the United Steelworkers of America in an action for wrongful death. *Affirmed.*

Kenneth B. Howard, Jr., Coeur d'Alene, Idaho; Lloyd J. Webb, Twin Falls, Idaho; Bruce O. Robinson, Bonners Ferry, Idaho; and Robert J. Cartwright, San Francisco, California, attorneys for appellants.

Wayne P. Fuller, Caldwell, Idaho; George H. Cohen, Washington, D.C.; and Frederick V. Betts, Seattle, Washington, attorneys for respondent.

SHEPARD, J.

This is an appeal from a summary judgment in favor of United Steelworkers of America (U.S.W.A.) in an action brought on behalf of the minor children and heirs of four deceased mine workers who died in the 1972 Sunshine Mine fire disaster at Kellogg, Idaho. *See* Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980). The instant action was brought on theories of negligence and fraud.

The well reasoned opinion of the trial court ordered dismissal of plaintiffs-appellants' fraud claims on the basis that they rested on their pleadings and did not present affidavits or other evidence in response to the evidence submitted by U.S.W.A. We affirm. The trial court in its opinion also ordered dismissal of plaintiffs-appellants' negligence claim on the basis that no duty on the part of U.S.W.A. had been established, the breach of which had caused the damage. We affirm. The trial court, in its memorandum opinion, also suggested this Court re-examine its decision in *Dunbar*, *supra*, as to whether the claims of plaintiffs-appellants are preempted under federal labor law. We decline the invitation since that issue is not necessary to the decision in the instant case.

I. THE FRAUD CLAIM

Plaintiffs-appellants' complaints allege that the U.S.W.A. made representations to its members who were workers at the Sunshine Mine, that the representations were false, that they were relied upon by the employees, and that they were the proximate cause of decedents' death. Those alleged representations were:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had concern for said welfare, safety and interest of its members.

B. That it has a reliable degree of expertise in underground mining.

C. That it would develop adequate programs of safety through its union representatives for the benefit of its members, the rank-and-file of said union.

D. That it would provide competent union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the union contract with the Sunshine Mine as it related to the safety and accident prevention.

There is no specificity as to whether the alleged fraud was actual or constructive. In an action alleging actual fraud, the claimant must prove that the other party acted with an intent to deceive. Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769 (1977). In case of constructive fraud the element of intent to deceive is not required. State v. Hightower, 101 Idaho 749, 620 P.2d 783 (1980); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); McGhee v. McGhee, 82 Idaho 367, 353 P.2d 760 (1960). A party alleging fraudulent misrepresentation must prove each of the following elements: a representation; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; the speaker's intent that it should be acted on and in the manner reasonably contemplated; the hearer's ignorance of its falsity, reliance on its truth, right to rely thereon, and consequent and proximate injury. Smith v. King, 100 Idaho 331, 597 P.2d 217 (1979).

Summary judgment should be granted only when the pleadings, depositions and admissions, together with affidavits, if any, show that there is no genuine issue of any material fact. The facts are to be liberally construed in favor of the party opposing the motion which is also given the benefit of all reasonable inferences which might be

reasonably drawn from the evidence. Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982).

Here, the U.S.W.A. submitted evidence establishing that it did not represent to the miners that it had expertise in mine safety or that it could insure a safe work place. Plaintiffs-appellants failed to present any evidence by way of affidavit or otherwise which contradicted the assertions of the U.S.W.A. When a motion for summary judgment is made and supported by affidavit, an opposing party may not rest upon its pleadings, but must respond by affidavit, deposition or interrogatories setting forth specific facts showing a genuine issue of fact. First Piedmont Bank and Trust Co. v. Doyle, 97 Idaho 700, 551 P.2d 1336 (1976); I.R.C.P. 56(e).

Since plaintiffs-appellants relied only upon their pleadings and produced no evidence by way of affidavit or otherwise, there is no showing of any genuine issue of material fact regarding the fraud allegations, and the trial court was therefore correct in granting the motion for summary judgment on the fraud claim.

II. THE NEGLIGENCE CLAIM

At the time of the fire there existed a collective bargaining agreement between U.S.W.A. and the Sunshine Mining Company which made provisions for the safety of workers in the mine. It is asserted by plaintiffs-appellants that from such collective bargaining agreement and/or the constitution of the U.S.W.A., there arose a duty on the U.S.W.A. regarding the safety of its members employed at the Sunshine Mine. It is asserted by plaintiffs-appellants that the duty imposed upon U.S.W.A. by those documents was breached in that the decedents did not have the use of self-rescuers; that some of the self-rescuers were inoperative because of age; that self-rescuers were stored in locked boxes; that the mine workers had not been trained and did not know how to use self-rescuers; that at certain levels no self-rescuers

were stored or they were too few in number for the number of workers; that there were no periodic fire drills or evacuation drills; that a stench warning system had not been tested and did not work, and that the mine workers had not been made familiar with proper exit procedures.

We hold that the instant case is indistinguishable from this Court's recent opinion in Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984). In *Carroll* plaintiff was a mine worker in a different mine, but in the same mining district as were decedents in the instant case. In *Carroll* a collective bargaining agreement existed between the union and the company employer, and, as here, Carroll was injured while working in the mine. Carroll was a member of, and brought action against, the United Steelworkers of America, asserting that the union had been negligent in carrying out its duty which the union had undertaken under the terms of the collective bargaining agreement with the employer.

In *Carroll*, the opinion of the majority was authored by Huntley, J., and held that summary judgment granted to United Steelworkers was affirmed since,

> "Under Idaho law, it is settled that an alleged failure to perform a contractual obligation is not actionable in tort. . . . Mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is insufficient to establish a duty in tort. . . . Consequently, Carroll's cause of action, if any, arising from the Collective Bargaining Agreement lies only in contract, not in tort." 107 Idaho at 719, 692 P.2d at 363.

Hence we hold that the trial court was correct, and its summary judgment of dismissal of plaintiffs-appellants negligence claim is affirmed.

III.

As above-noted, the trial court, in its opinion, invited this Court to review its holding in Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980), wherein this Court dealt with the issue of federal preemption of the field under the National Labor Relations Act. Although perhaps not necessary to this decision, we affirm our holding in *Dunbar*. U.S.W.A. argues that all relationships between a union and its members resulting from a collective bargaining agreement, are preempted, with the union's duty being only that of "fair representation." Although the N.L.R.B. has been given exclusive jurisdiction to regulate and interpret collective bargaining agreements, it has no authority to award damages in tort in favor of members and against the union. We remain of the view expressed in *Dunbar*:

> "We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, i.e., if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member." 100 Idaho at 527, 528, 602 P.2d at 25, 26.

The decision and orders of the trial court granting summary judgment and dismissal of plaintiffs-appellants' complaint are affirmed. Costs to respondent.

DONALDSON, C.J., concurs, and BAKES, J., concurs in parts I and II.

BISTLINE, J., dissenting.

The majority holds that Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), is indistinguishable from today's case, and upon that basis affirms the district court's decision granting the defendant's motion for summary judgment. Because it *is* virtually indistinguishable, again I dissent as was also required in *Carroll*.

As I pointed out in *Carroll*, the majority's conclusion that the United Steelworkers of America assumed no duty to the plaintiff, Michael Carroll, was based upon the mere citation to one hornbook and three perfunctory paragraphs of discussion. *Id.* at 722, 692 P.2d at 366 (Bistline, J., dissenting). The majority also ignored the fact that we were dealing with a motion for summary judgment, and failed to construe all of the evidence, and inferences which could be drawn therefrom, most favorably to the plaintiff as the party against whom the motion was directed. *Id.* The result of that failure had a catastrophic impact on Idaho jurisprudence.

Today's majority, in relying upon *Carroll*, perpetuates the illogical, unreasonable, and callous indifference to an individual's injuries that *Carroll* created. On the reasoning set forth in my *Carroll* dissent, I am again unable to join the opinion which this day becomes the opinion for the Court.

My dismay with today's opinion rests not only upon the majority's reliance upon *Carroll*, but on internal inconsistencies of that opinion. For example, on pages two and three of the slip opinion, it is stated that: "The trial court, in its memorandum opinion, also suggested this Court re-examine its decision in Dunbar [v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980)], as to whether the claims of plaintiffs-appellants are preempted under federal labor law. *We decline the invitation since that issue*

is not necessary to the decision in the instant case." (Emphasis added.) On page six, however, a 180-degree turn-about is observed: "Although perhaps not necessary to this decision, we reaffirm our holding in *Dunbar*." Such a caliber of decisionmaking leaves something to be desired. Preferably, where the majority bases its judgment today on *Carroll*, it should re-examine its validity and do so in light of the principles of jurisprudence advanced in the *Carroll* dissent. In this, the second year since *Carroll*, the majority has yet to meet the contentions of that dissent, which contentions are now presumably observed to be unassailable. On other occasions, concededly on a decelerating scale, a majority opinion of this Court would ordinarily explain in its opinion the error in the reasoning of a dissent.

HUNTLEY, J. concurring and dissenting.

The majority, in its treatment of the negligence claim, has granted to labor unions that which no other person or entity has under American law—*immunity from liability for tortious conduct.*

I do concur in the majority's treatment of the fraud claim. As to the presumption issue, I concur in the result reached but analyze the issue somewhat differently.

I. THE NEGLIGENCE CLAIM

The trial court granted the Union's motion for summary judgment of dismissal on the Miners' negligence claim concluding that the Miners' had not established that the Union owed a duty to the deceased miners. The trial court's memorandum opinion in support of its order granting the motion for summary judgment on the negligence claims is set forth in footnote 1 hereto.[1]

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[1] Plaintiffs seek to hold the Union responsible on negligence theories. A fundamental component of a negligence claim is the existence of a duty toward another. *Hoffman v. Simplot Aviation,*

The memorandum decision of the learned trial court is well-reasoned but proceeds from a faulty focus or incorrect predicates in several respects: First, the trial

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Inc., 97 Idaho 32, 539 P.2d 584 (1975). A duty is a standard of conduct to which the defendant is required to conform. *Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). Plaintiffs rely on the collective bargaining agreement and RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A (1965), as the sources for the legal duty owed by defendant Steelworkers.

A breach of contract is not in and of itself a tort. A contract may, however, create a situation which furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of care in the performance of those services. "The duty of care arises . . . irrespective of contract," and "[t]here must be a breach of duty apart from the non-performance of a contract." *Taylor v. Herbold*, 94 Idaho 133, 484 P.2d 664 (1971). Mere failure to carry out contractual obligations cannot support a tort action while misfeasance in the performance of contract obligations may support a tort action.

Plaintiffs complain the Union "failed to develop an adequate program for inspection and for safety, . . . failed to inspect," and "failed to require other safety devices to be used." Clearly the plaintiffs are upset with what the Union did not do, not with what it did do. Non-performance of alleged contractual duties will not sustain a tort claim.

The "Good Samaritan Doctrine" is enunciated in RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A. Section 324A reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for the physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> (A) his failure to exercise reasonable care increases the risk of such harm, or
>
> (B) he has undertaken to perform a duty owed by the other to the third person, or
>
> (C) the harm is suffered because of reliance of the other or the third person upon the undertaking.
>
> Section 323 is substantially the same as 324A except it deals with the situation where an individual undertakes to render services directly to another person.

court embarks upon a lengthy analysis of whether the Miners' claim meets the requirements of Restatement of Torts (2d) Sections 323 and 324A, which he characterizes

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> We start with the premise there is no duty to be a good Samaritan. The law will only hold a defendant liable if the plaintiff can meet the criteria laid down by RESTATEMENT. This Court has already held there is no proof the plaintiffs' decedents relied on the Union's safety activities. Therefore, the third possible criteria, that the harm is suffered because of reliance of the third person upon the undertaking, is not satisfied. Neither has the first criteria, i.e., the failure to exercise reasonable care increased the risk of harm, been met.
>
> In *Clemente v. United States*, 567 F.2d (1st Cir. 1978), the plaintiffs sued over the death of Roberto Clemente and two other passengers and crewmen in a private airplane crash. The plaintiffs alleged Federal Aviation Administration employees had acted negligently in failing to warn Clemente and other passengers the airplane was overweight and lacked a proper flight crew. The FAA had promulgated an internal order saying, "clear indication of alleged illegal flights should be made known to flight crew and persons chartering the service."
>
> The appeals court held the defendant United States could not be held liable on the Good Samaritan theory.
>
> > While the Federal Aviation Act empowered the administrative staff on the FAA to issue an order such as SO8430.20C, the act itself does not require this conduct. The agency, in issuing the order, was acting entirely gratuitously and was under no obligation or duty to plaintiffs' decedents or any other passengers.
> >
> > [T]he *Restatement of Torts (Second)*, §§ 323 and 324A n makes it clear that liability in such a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from his reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm. . . . There was no underlying statutory duty to offer a special protection to plaintiffs' decedents; the failure to inspect *in no way added to the risk* of injury to the passengers or crew; and there is no evidence that anyone relied on the contents of

as the "Good Samaritan Doctrine." From there the court reasons plaintiffs' cause fails because non-performance

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SO8430.20C and limited their own safety precautions accordingly. (emphasis supplied).

Like *Clemente*, the Union's alleged failure to inspect, warn and make safe did not increase the danger to the miners beyond that under which they were operating. The Steelworkers may not have helped the miners' safety problems, but they did not augment them either. See also *Blessing v. United States*, 447 F.Supp. 1160 (E.D. Pa. 1978). The Court notes the case at bar is also akin to the *Clemente* case in that there is no evidence the rank-and-file Union members limited their own safety precautions because of Union activities.

Lastly, the defendant did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly placed the responsibility for making the work place safe upon Sunshine Mine.

> The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment . . . .
>
> . . . Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent *with the company's responsibility to provide for the safety and health of its employees* during the working hours of their employment and the mutual objectives set forth in section 1. (emphasis supplied).

The collective bargaining agreement makes it very clear the primary responsibility for the rank-and-file members' safety and health was placed upon the company as opposed to the Union which could only act in an advisory capacity. The Union could talk all it wanted to but when it came right down to it, the Union was without authority to force any safety and health measure upon the company except in highly limited, and for our purposes here, irrelevant circumstances. Herein lies the central factor in this dispute. The technical requirements of the RESTATEMENT aside, it is fundamentally unfair to hold a party liable for a condition it did not create or worsen and which it had no jurisdiction to correct. Summary judgment is granted dismissing all of plaintiffs' negligence claims.

(as distinguished from misfeasance) will not support a tort action, the trial court stating:

> "Clearly the plaintiffs are upset with what the Union did not do, not with what they did do."

Both premises are incorrect. The record establishes that the Unions' safety undertaking was not the act of a "Good Samaritan" but was in fact a substantial part of the Union's offering in consideration of the workers' membership and payment of dues. The Collective Bargaining Agreement provided for the Union's safety inspection function, which service was bought and paid for by union dues. In any event, it provides an incorrect focus to view and interpret Sections 323 and 324A under the rationale of the Good Samaritan Doctrine—the Restatement does not so characterize those sections and their specific language includes the rendering of services "for consideration." In this regard, the address of I.W. Abel, President of the U.S.W.A. in his November 1969 address to the delegates to the "International Conference of Safety and Health of the Steelworkers' (Appendix A hereto) is instructive. Moreover, the characterization of the Miners' claim as one for mere non-feasance which did not increase the risk of harm is incorrect. As the analysis below will demonstrate, the Union, through its representatives, did embark upon safety inspections, and the issue is whether they negligently performed that undertaking, or whether the Union's negligent performance resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion that would otherwise have been the situation had the inspections been performed without negligence.

As its second premise for a foundation of its dismissal of the negligence cause the trial court opens:

> Lastly, the defendant [USWA] did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agree-

> ment clearly placed the responsibility for making the work place safe upon Sunshine mine.

However, a more detailed exposition below will demonstrate the Miners' cause is not premised on either a claim that the Union should perform management's safety functions or that the Union should make the workplace safe—rather the cause of action is premised upon the Union negligently performing those safety functions which it did in fact undertake.

Recently, in Carroll v. United Steelworkers of America, 107 Idaho 117, 692 P.2d 361 (1984), this Court ruled that mere nonfeasance, even if it amounted to willful neglect to perform a contract, is insufficient to establish duty in tort. In *Carroll*, a Union member accused his Union of failing to perform protective actions relative to conducting safety inspections at the work site but did not allege negligent performance of those actions once undertaken. In *Carroll*, no inspections were made. In the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee *failed* to inspect but that they actually performed their duty of inspection in a negligent manner and failed to report what should have been obvious safety problems, the duty to report necessarily flowing from the act of inspection. Hence, the instant case does not present a situation of non-feasance but one of malfeasance.

The Miners assert that the basis of a negligent undertaking is established in this case under *both* the collective bargaining agreement and the Constitution of the Union. The Constitution of the International Union and of the Local Union provided in pertinent part:

> Object . . . to establish through collective bargaining adequate wage standards, shorter hours of work, and improvements in the conditions of employment for workers and industry.
>
> . . .

> A safety and health committee under the direction of the International Union or its designated representative, shall be established in each Local Union.

At the time of the fire, there existed a collective bargaining agreement between the Union and the Sunshine Mining Company dated March 11, 1970 which provided in Article 9, Section 1, the following:

> The Company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.
>
> An employee who believes that he is being required to work under conditons [sic] which are unsafe beyond the nornmal [sic] hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.
>
> In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and

agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exrcises [sic] his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the Plant Manager for his consideration and for such action as

> he may consider consistent with the Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.
>
> A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.
>
> Two men shall be designated by the Union to accompany the Safety Engineer on the tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The results of this tour shall be considered at the following Union-Man gement safety committee meeting.
>
> In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the greivance [sic] procedure.

Affidavits established that a health and safety committee was formed. As a matter of practice within the Union, the committee members of the health and safety committee required by the constitution were also members of the joint safety committee required under the collective bargaining agreement. The Miners assert that since the inspections and recommendations regarding practices and rules were services to be performed by the Union for the benefit of its member miners, the Union had a duty to use due care in performing these services.

The Restatement (Second) of Torts, § 323 (1977) states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the

other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm,

(b) the harm is suffered because of the other's reliance upon the undertaking.

The Miners assert that evidence was presented to establish the following:

(1) John Rawson, Glen Rossiter, Wayne Johnson and Don Wood did not have the use of self-rescuers; (oxygen masks and cannisters)

(2) Self-rescuers were stored in boxes with padlocks;

(3) Some of the self-rescuers were eighteen years of age and were corroded so that the valve could not be turned to operate them;

(4) Some of the self-rescuers were inoperative and others were used by miners who sensed them getting hot and discarded them not knowing that the development of heat was an indication that the self-rescuer was working;

(5) The miners did not know how to use self-rescuers that may have been available and had not been trained in their use;

(6) No self-rescuers were stored at the 5,400 level where John Rawson and Glen Rossiter were stationed; at other levels there were fewer cannisters than the usual number of men working at those levels; and that there were only six units at the major escape route at the 3,100 foot level.

(7) There were no periodic fire drills or evacuation drills for miners working underground;

(8) There were no opportunities for the miners under controlled circumstances to become familiar with proper exit procedures and sequences; and

(9) There were no periodic checks or tests made of a stench warning system and many of the survivers testified to facts permitting the inference that the system did not work.

(10) Evidence exists that the fire was started by spontaneous combustion in a pile of accumulated rubbish.

The Miners contend that most of these deficiencies could have been observed and should have been observed in the course of a reasonable inspection and, further, that recommendations could have and should have been made with regard to these deficiencies. A reasonable inference which the trial court should have drawn in favor of the miners is that the inspecting personnel were negligent in not seeing and reporting some of those conditions. We cannot say as a matter of law that had the inspectors reported these blatant violations to the committee, with the committee in turn reporting them to management, that management would have corrected these defects—neither was the trial court correct on summary judgment to resolve that factual issue the other way. Rather such is an issue of proximate cause not properly resolved on summary judgment. The record is devoid of any opposing affidavits or deposition testimony that the inspections were in fact conducted in a reasonable and prudent manner in accordance with recognized standards.

Construing the facts and the inferences most favorably toward the parties against whom summary judgment is sought, and absent a record establishing that management had no concern for safety, the reasonable inference would be that management would have acted responsibly had these matters been brought to its attention.

In light of the above record, we cannot conclude as a matter of law that the Union owed no duty to exercise

due care in performance of the inspections once its personnel undertook them. Moreover, we cannot conclude as a matter of law that the Union owed no duty to bring to the attention of the members of the safety committee the safety problems that existed in the Sunshine Mine. Because the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and, *in fact inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection. For this reason I would reverse the trial court's order granting the Union's motion for summary judgment of dismissal as to the negligence claims.

II. THE PREEMPTION ISSUE

In Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), which case arose out of the same facts as the instant appeal, this Court held on remand that material issues remained regarding whether the Union had a duty to inspect and whether it breached that duty. In *Dunbar*, the question of the existence of a duty was never reached since the trial court held that the cause of action was preempted by the federal duty of fair representation. Justice Bakes, specially concurring in Part I of *Dunbar*, wrote:

> I concur with the majority's ruling that the trial court erred in dismissing the appellants' wrongful death action against respondent United Steelworkers because of the preemption doctrine. An action for wrongful death is a creature of our state statutes, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. Assertion of jurisdiction by the courts of this state over the appellants' action

> would appear to present no significant risk of undue interference with national labor policy.

No provision of the National Labor Relations Act provides that it is federal policy to immunize labor unions from responding in tort for their negligent acts. In Brown v. Hotel & Restaurant Employees & Bartenders, —— U.S. ——, 104 S.Ct. 3179 (1984) the court noted:

> The National Labor Relations Act . . . leaves much to the state, though congress has refrained from telling us how much.

The Union argues that *all* relationships between a union and its members flowing from a collective bargaining agreement are preempted, with the union's duty being only that of "fair representation." This leads to some rather fuzzy analysis. Preempt is defined as "to seize upon to the exclusion of others," Webster 3d Int'l Dictionary. Although the NLRB has been given exclusive jurisdiction to regulate and interpret collective bargaining agreements as to ongoing performance and modification, the NLRB has not been given (nor has it seized) the function of considering tort damages for wrongful death for past union misfeasance. I remain of the view expressed by the majority of this Court in *Dunbar*, *supra* at p. 527:

> We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, i.e., if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational

status anymore than if its conduct brought death to a nonunion member.

Recently in Allis-Chalmers Corp. v. Roderick S. Lueck, —— U.S. ——, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) the United States Supreme Court held that when resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law. In *Allis-Chalmers*, the United States Supreme Court reversed a Wisconsin Supreme Court decision which had held that a claim that a Union had handled an insurance claim in bad faith was not pre-empted because under Wisconsin law the tort of bad faith is distinguishable from a bad-faith breach-of-contract claim, and that although a breach of duty is imposed as a consequence of the relationship established by contract, it is independent from that contract. In reversing the Wisconsin decision, the United States Supreme Court concluded that the right asserted by the Union member was rooted in contract, and the bad-faith claim could have been pleaded as a contract claim under § 301. The Court concluded that unless federal law governed that claim, the meaning of the disability-benefit provisions of the collective bargaining agreement would be subject to varying interpretations, and the congressional goal of a unified body of labor-contract law would be subverted. The *Allis-Chalmers* Court stated, "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation. . . . These questions of contract interpretation, therefore, underlie any finding of tort liability, regardless of the fact that the state court may chose to define the tort as 'independent' of any contract question. Congress has mandated that federal law govern the meaning given contract terms. Since the state tort purports to give life

to these terms in a different environment, it is preempted." In the instant case, however, we need not interpret a contract. The appellants are suing for breach of a duty to inspect and report under the reasonable and prudent person standard.

Both the Union on appeal and the trial court in its memorandum decision urge this Court to reconsider its holding in *Dunbar*. The trial court stated:

> This case does not involve a collective bargaining agreement whereby the Union assumed management safety responsibilities and therefore management's common law duties. In Helton v. Hake, 564 S.W.2d 313 (Mo. 1978), the collective bargaining agreement provided the Union steward would ensure no work was done in the immediate area of high tension lines. The agreement distinctly said the employer was in no way responsible for the performance of these safety functions by the steward.
>
> . . .
>
> . . . When the Union takes actual authority for enforcing safety conditions on the work site away from management, it should be held responsible for breaches in a duty of care just as management would have been at common law. The defendant Union's collective bargaining agreement with Sunshine did not allow the Union to enforce safety measures. The Sunshine/Steelworkers' contract did say the Union "shall inspect," but the Union could do nothing but advise once it had been reported.

While the trial court concluded that *Helton* supported the Union's position, in fact it supports that of the Miners. In *Helton*, the Missouri court stated:

> The complaint alleges that the Union, through its agent, the steward, negligently and carelessly failed to enforce the safety rule relating to work in the area of high tension power lines. The suit is clearly

> brought as an action in tort seeking recovery for wrongful death due to the alleged negligence of the defendants. The only relevance of the collective bargaining agreement appears to be that it would determine, to some extent at least, the nature and scope of defendants' duty.

Likewise, in the instant case, the provisions of the collective bargaining agreement do not require interpretation, as was the case in *Allis-Chalmers*, *supra*, but rather the provisions determine only the nature and scope of the Union's duty. The trial court acknowledges that the Union had a duty to "advise;" and it is *that* duty which appellants contend was breached. Whether the Union breached the duty and whether such breach, if established, was the actual or proximate cause of the appellants' decedents' deaths, are not issues addressed by this appeal. Our narrow holding today should be that the Union, having inspected, assumed a duty to use due care in inspecting and, from the duty to use due care in inspecting, arose the further duty to advise the committee of any safety problems the inspection revealed. Moreover, since an action for wrongful death is a creature of our Idaho statute, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state and because the instant action does not require an interpretation of the terms of the collective bargaining agreement, it is not preempted by federal law.

In Heckler v. International Brotherhood of Electrical Workers 772 F.2d 788 (11 Cir. 1985) the court correctly analyzed the non-applicability of the preemption doctrine to cases of this nature [2]:

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[2] The *Heckler* court blinked and waffled shamefully by its final qualifying paragraph:

> The narrow scope of this holding should be emphasized. This case is distinguishable from earlier cases in which a plaintiff sought relief from a union under a collective bargain-

The employee's state law action does not run afoul of the recent pronouncement in Allis-Chalmers Corp. v. Lueck, 53 LW 4463 (1995), in which the Court found preempted a state action for bad-faith handling of an insurance claim arising out of a disability insurance plan included in a collective bargaining agreement. The tort in that case was essentially a product of the labor contract itself—without the contract, no tort claim could have existed. In this case, the claim is essentially one of common law negligence for breach of a duty of care. Liability will turn on basic negligence principles as developed by state law.

A union breaches its duty of fair representation only when it treats an individual in an arbitrary, discriminatory, or bad faith manner. Vaca v. Sipes, 386 U.S. 171 (1967). Two key issues must be addressed to determine whether a common law negligence action is preempted by the federal remedy for breach of such a duty. First, a court must determine whether the duty the union allegedly breached is so inextricably intertwined with the collective bargaining agreement that only a duty of fair representation claim is available. Second, in making this determination, the court must be aware of federal labor law policy and whether a negligence action against a union impermissibly impedes the federal labor-management regulatory scheme.

With regard to the latter concern, the primary inquiry is whether the duty sought to be enforced against the union is so tangential to the federal scheme that the action is properly exempted from

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ing agreement for a breach of the union's general duty to inspect for the safety and benefit of the entire work force. In this case, the employee alleges a duty running from the union to her individually that required it to assure she was qualified to work before she was assigned.

the general preemption rule. Balancing of the relevant factors leads to a conclusion that the employee's negligence claim is not preempted.

The union's duty of fair representation does not displace those duties created by state law that prohibit a person or corporation form engaging in tortious conduct resulting in death or injury. Nothing in the federal statutory scheme expressly addresses such conduct or provides a mechanism for its redress. Likewise, it cannot be said that by failing expressly to address acts of negligence by unions, Congress intended to permit unions to engage in such acts free of the scrutiny of state courts.

Nor is the union's contractual duty to assure worker training inextricably intertwined with its federal duty of providing fair representation. The fact that reference to a collective bargaining agreement must be made in order to define the scope of the duty does not mean that a negligence action is no more than a preempted § 301 action. Even if the state action threatens adjudication of matter cognizable by the National Labor Relations Board or a court adjudicating federal labor law, the extent of that threat must be balanced against the importance of the action to the state. No impermissible conflict exists in this case.

I would affirm as to the fraud claim and reverse and remand for trial on the negligence claim.

APPENDIX "A"

I. W. ABEL

President

United Steelworkers of America

Thank you very much, Director Schremp, our good friend and your host director on this great occasion, Director Germano, Chairman of our National Committee and Board Members on Safety and Health, Board Member Younglove, Director Thornton, and associates of Paul's, Marco, Adolph and Al Skinner, members of the staff and this great assembly of delegates to the International Conference of Safety and Health of the Steelworkers.

I perhaps should start off this morning, Joe, in the tradition of the times by spending a few minutes, a half hour, three-quarters, berating you over the conditions of the climate here in this great City of Chicago. In keeping with the times, I should say it is your fault. But I should remind you that when we were last in convention, you arranged to have it hotter than hell for us. Now you make it all but impossible to get in because of fog and smog. I, like others, had intended to get in last night but found myself grounded in the city of brotherly love, Philadelphia, because it was impossible to get here. Then this morning, after we arrived we found ourselves circling overhead for a full hour waiting our turn to come in. I couldn't help but think as we circled, knowing the conditions, such as only one runway being used and visibility at one-half mile, that I was coming to a safety conference. I don't mind telling you as we flew around I found myself hoping that all of these wonderful safety implements that the airlines and the air industry has developed would be working in topnotch shape. I found myself hoping, too, that those poor workers, those human

beings that operate this equipment would this morning be living by the rules, by the book, and I'm telling you it is a good feeling when finally you get a glimpse of the ground and then you feel yourself hit the runway to know that not only was the equipment working but the workers were working by the rules and by the book. So it was under those conditions that I come this morning.

Joe, I won't take time holding you responsible because I know in this instance, like many other instances, we get too much hell for things for which we are not responsible as it is.

I'm pleased to be here this morning to see such a great turnout. That is an indication of the tremendous interest and concern that our local unions have throughout the great countries of Canada and the United States for safety and health in our industries.

I want to thank Director Schremp for asking me to talk to you about safety and health and I also want to compliment him and his associates, outstanding individuals such as Marco and Adolph and Al Skinner for what they are doing in an area of extreme importance to our membership and what they have accomplished in a few short months since they have been given and have assumed the responsibilities of our Safety and Health Department.

This international conference signifies the increased emphasis that our Union intends to place upon the safety and health of members of the United Steelworkers of America.

There have been many changes for the better in our Union in the last few years—increased participation in bargaining—expansion of the Industry Conference concept—a new Department of Organizing—establishment of a Strike and Defense Fund—breakthroughs on incentives and earnings protection—highest earnings and best pensions in our history. And while all of these are

important, they are no more important than the safety and health of our members that work in the mines, the mills and the factories throughout our jurisdiction.

I am not here today to perform a routine function of my office as President and say a few words of welcome as part of an opening ceremony. I am here today because I believe as strongly as I can in making the workplaces in our jurisdiction the safest and healthiest places there are.

And I am here because I also believe as strongly as I can in making our communities safer and healthier places in which to live and to bring up a family. There is no reason why steel communities must be dirty and unsafe places to work and live.

I am here today because I want to attempt to convey to you—and through you to our membership—that our Union is making occupational health and safety a top priority. That is why we have recognized our Department of Safety and Health and given it added manpower. We may have been remiss in this area in the past. But we are not going to be remiss in the future, that I assure you.

I know, as well as you know, that safety and health are difficult subjects in which to arouse interest. Some of our members even resent being told to wear protective equipment. Others object to safety rules. But safety and health are somewhat like unemployment. An unemployment rate of 4% doesn't impress you if you are among the 96% working. But it certainly impresses the hell out of you if you are one of the 4%. To put it another way—it's a recession, we have often heard said if your neighbor's out of work; but if you're out of work, it's a depression.

Unfortunately, that's the way it is with safety and health. A healthy and uninjured worker too often has little interest in safety and health. Of course he should

not have to suffer a disabling injury or incur a disease from some dangerous toxic agent to have the kind of interest he should have. One of our jobs is to make our members—and the companies—as safety and health conscious as possible.

Unfortunately, there doesn't seem to be much "sex appeal" in industrial safety and health. It's difficult to arouse interest in these areas—not only among many workers, but among our legislators and the general public.

It has been said that the American public isn't too concerned over atomic fall-out because so far it hasn't affected television reception. Perhaps the same could be said about concern over safety and health. We, too, seldom get concerned unless and until an accident or tragedy hits home and affects us.

Now I want to cite two examples of a tragic loss of life to demonstrate my point over industrial accidents and how they relate to public and governmental interest and concern.

You all recall the horrible tragedy that took the lives of three astronauts when fire consumed the Apollo One space capsule at Cape Kennedy on January 27, 1967. The Nation properly paid tribute to the astronauts and mourned their deaths. But then there was registered great national concern and a national demand that immediate steps be taken to prevent a recurrence—and rightfully so. A seven-man board was appointed to investigate that fatal fire. After 10 weeks of investigation, the board issued a 3,000-page report which blamed a faulty wire as the probable cause and cited other deficiencies in engineering and manufacture in the Apollo project. Millions of dollars were spent and corrective measures were effected. You also recall, I am sure, the headlines and extensive publicity given the accident and investigation by all the news media.

Now, a few weeks before this tragedy struck the astronauts, three Steelworkers were killed in an oxygen-making plant of Great Lakes Steel when a compressor blew up. Director Charley Younglove, Director of our Permanent Safety Committee of the Board, was out to the plant within a half hour or 45 minutes after the accident, and he told me the bodies of the three men could not even be identified. He told me that the compressor chamber, made of iron about 2½ to 3 inches thick, was just melted down, like melted ice. Here was an accident just as tragic as the one that claimed the lives of the astronauts—three men burned beyond identification—three men who also left behind families. But what kind of interest did this accident arouse?

It barely was given any attention even in the area where it happened. The Detroit News, for example, carried a brief item—about three inches long—on Page nine.

Here we had two separate but similar accidents—three men killed in each—three families left without fathers and husbands. Yet one gets national attention, a lengthy investigation with no effort or expense spared to prevent a recurrence—and the other goes barely noticed.

In no way do I mean to detract from the dedication and sacrifice of our astronauts. I only ask that the same concern be shown other human beings who also give of themselves in the occupations they pursue. And we, as union members, as workers, as union representatives, as part of the general public, must demand the same kind of concern and precautions for workers in the plants as for astronauts in their space capsules.

There is still another example of what I mean by relative concern over industrial safety. Many Americans are greatly aroused over Vietnam and the deaths that result from our involvement there. But—as Secretary of Labor Shultz told the recent AFL-CIO convention in Atlantic City last month—how many people know that in the last

eight years more Americans have been killed at their workplace than in Vietnam?

Again, I do not mean to detract from the sacrifices of our fighting men in Vietnam. I cite the contrasting figures to demonstrate the lack of equal concern by many Americans over the sacrifices of workers in their jobs on the home front.

I am sure most of you are familiar with the vast difference between worktime lost through strikes and time lost through industrial accidents. But for the benefit of those who don't—let me again review them. In 1967, 42.1 million man-days were lost due to strikes but 245 million man-days were lost as a result of occupational injuries. In short, six times as much time was lost because of injury as was lost because of strikes.

The statistics on industrial safety and health are truly shocking—14,800 workers killed last year in accidents—2,200,000 disabilities suffered—$1½ billion lost in wages —$7.8 billion lost in gross national product.

In more specific terms consider the following toll that is exacted upon American workers: Of the 6,000 men who have been uranium miners, an estimated 600 to 1,100 will die of lung cancer within the next 20 years because of radiation exposure on the job.

More than 3,000 cases of silicosis are reported every year from exposure to free silica. One out of every four or five asbestos workers in New York City dies of lung cancer caused by the inhalation of asbestos fibers.

Yes, industrial disease poses a threat just as great, if not greater, than industrial accidents. It is estimated that every 20 seconds a new and potentially deadly toxic agent is introduced in industry. A recent study involving 3,200 workers in 231 foundries reveals that one in 15 of such workers was exposed to environmental conditions capable of producing disabling and fatal diseases. Some

chromium compounds, widely used in metal working and plating, are suspected cancer agents.

So one can easily see that the present toll, and possible toll—when you include the silent killers, the gases, the fumes, etc.—is a costly one and potentially more costly.

Let me demonstrate this toll in relation to the time that is devoted to this conference here today and tomorrow.

This is a two-day conference. During this two-day conference 110 workers in the United States will die from on-the-job accidents, or work-related diseases. During these two days 54,400 workers will suffer injuries on the job. And during the two days of this conference, 17,000 will suffer disabling injuries or work-related diseases.

But these are cold statistics which convey some of the seriousness of the safety problem but do not reflect the cost of industrial accidents in human terms. You cannot put a price tag on human life, or human suffering, the mental anguish which results, the plans and hopes which have to be scrapped and forgotten. These are the real costs of accidents—not the man hours of time lost but the men lost; not the loss in gross national product but the loss of life and limb; not the money lost in wages but the permanent loss of a limb or the permanent loss of a faculty.

And yet, despite the losses—in time and money and human suffering—the struggle for effective legislation and enforcement is an uphill struggle. There has been a failure at all levels of government to provide effective safety and health standards but State governments have been the worst violators. With a bare handful of exceptions, states have failed to provide even the most primitive standards to protect workers. The Federal government isn't much better. Consider these facts: There are only 1,600 safety inspectors of any kind, State or Federal, in the entire United States; four states have no inspection

personnel whatsoever; only three states have inspectors who are trained in the field of occupational health and industrial hygiene. You know, the ironic thing is that there are twice as many fish and game wardens in the United States as there are safety and health inspectors.

Why is there this great absence of effective legislation and enforcement? To put it simply and bluntly: Because legislators at all levels of government have been more concerned with the profit motive than the human motive.

State legislatures generally have been notorious in catering to special interests and Congress hasn't been much better. Under the Walsh-Healey Public Contracts Act, the U.S. Bureau of Labor Standards is charged with inspecting companies that have government contracts. But because Congress limits funds for such activities, the Bureau inspects less than 8% of the covered plants each year. I remind you that Congress didn't get too concerned about mine safety until 78 miners were killed in the mine disaster at Farmington, West Virginia. And an effective national mine health and safety act is still not a certainty as we meet here today.

The disgusting truth has been that industry's arguments against the costs of effective safety and health equipment have outweighed arguments that cost should not be the primary consideration.

Whenever a case is made for effective health and safety legislation business groups cut loose with a barrage of misleading propaganda. And when you strip away all the baloney—all the propaganda—the single, solitary reason for their opposition is that it will cost industry money.

How can anyone talk about costs when it comes to saving human life and limb? I say that no matter what it costs in dollars and cents, it must be done. I say that it's about time our Congress and our States tell industry to stop crying about costs and to do what must be done about safety and health.

While we can, with justification, point a finger of blame at our lawmakers, some of the blame lies with ourselves. We have not been as active or effective in political action as we can or should be. We have not elected enough of the right kind of people as often as we should. And when we have elected enough of the right kind of people, we have failed to receive a good enough return for our efforts.

The question now is, however, where do we go from here?

First, we start within our own Union, and we already have taken some significant steps. Your International Executive Board has established a permanent standing Committee on Safety and Health. We have reorganized and strengthened our Department of Safety and Health. We asked our districts to name Safety Coordinators, and we already have had a meeting of such coordinators in Pittsburgh. A comprehensive safety and health program has been drawn up by Director Schremp's Department for strengthening health and safety practices at the local union level. The holding of this conference, during which the new program will be discussed, is another example of added emphasis upon safety and health by our Union. One of the major features of the new program, for example, is the emphasis upon the importance of writing strong safety and health provisions in our collective bargaining agreements.

I want to say a few words about utilizing the collective bargaining process to incorporate safety and health provisions in our contracts. In my remarks to the Industrial Union Department's recent convention in Atlantic City, I urged the labor movement to establish a four-day workweek by 1973. I said that we should put a four-day workweek at the top of the list of our legislative and bargaining objectives. We can obtain that objective by amending the Fair Labor Standards Act so that a 32-hour workweek can be made uniform through Federal action.

Or we can reach that goal in collective bargaining. In urging unions affiliated with the IUD to work for the four-day week, I cited a number of reasons for doing so. One of the reasons we are advocating a shorter workweek is to reduce the hazards to the health of workers caused by long hours on the job.

It is a proven fact that after a certain age, production workers find it quite difficult to keep up with the iron horse. They become not only physically but also mentally tired.

Such wearing down of a worker's health eventually slows his reflexes which are his first line of defense against accidental injury. Thus, fatigue becomes another factor to consider in promoting safer and healthier working conditions. A reduction in the workweek, without a cut in pay, would do much to keep workers mentally and physically alert and thus help eliminate accident and health hazards.

Given another day each week free from their jobs, workers would have more leisure time with their families and friends for living and relaxing. They could give more adequate consideration to public issues. They would be in a better position to perform their duties as parents more competently, in such matters as their children's education—or as citizens.

The first great cries from the opponents of a four-day week have already been heard. They are spreading scare stories, alleging that this would be inflationary and that a shorter workweek would cripple the economy.

Such arguments are hogwash and I cite an article in the *Wall Street Journal*, an ad, if you please, calling a conference in the City of New York by 200 of our top leading industrialists and financiers, to there give consideration to the need now to institute shorter hours of work because of the tremendous changes that are taking place in our economy and our American industry. Gov-

ernment data on increases in profits, dividends and real earnings provide enough evidence to prove such arguments are hogwash. Between 1960 and the first half of this year, the net profits of corporations skyrocketed 94.5%; dividend payments to stockholders soared 80%; but the weekly, after-tax take-home pay of the average non-supervisory worker increased only 35%, and in terms of buying power, only 10%. In brief, industry can well afford the four-day week. In fact, it would benefit industry in a number of ways. Productivity among workers on a short workweek would increase because there would be less time lost, less work would be spoiled due to fatigue and monotony on the job, there would be lower labor turnover and the quality of products would improve. So, all in all, it would benefit workers by reducing fatigue on the job and thus reduce accidents; and it would benefit industry in the ways I have just enumerated.

Now, beyond our obligations to incorporate safety and health protection in our contracts, and to beef up our program on safety and health within our Union, we also have an obligation to fight for adequate legislation.

And we have some fighting to do right now—the minute this conference ends. I'm talking about the fight we're making in Congress for passage of the kind of legislation which will provide us with one giant step forward for the health and safety of workers. Before Congress right now is the Williams-O'Hara Occupational Safety and Health bill. It was introduced in the Senate by Senator Williams of New Jersey and in the House by Congressman O'Hara of Michigan. The bill would authorize the Secretary of Labor to set standards to assure safe and healthful working conditions. It would establish an enforcement procedure with specified penalties for violations of the standards, and would provide for badly-needed research, training, and a uniform reporting procedure. It also would assist the states in better enforcement, the gathering of information, and training. This is the bill that organized

labor supports. This is the bill that we want and must have if the job is to be done.

Last month, in my capacity as President of IUD, I testified in Washington on behalf of this bill before the Subcommittee on Labor of the House Education and Labor Committee. I attempted to convey to the Subcommittee the sense of urgency that organized labor has about such legislation, and the great importance that we attach to it. I also told them what my views were on the bill proposed by the Nixon Administration. The Administration bill is a weak bill and would not do the job, which should not come entirely as a shock to anyone in this room. It would not cover all places in employment. It would set up a Board to develop standards but the bill would bind the Board to adopt standards developed by industry-oriented organizations. And it would strip the Secretary of Labor of any effective enforcement power. Additionally, it would not go into effect until two years after it was signed into law.

But testifying for a bill is not enough. It helps but it takes more than talk before a Congressional Subcommittee. It takes talk from members of organized labor. It takes letters from labor. It takes visits and delegations from labor. And if need be, it takes some informational picketing and a little hell raising. It seems to me that generation of support for the Williams-O'Hara bill should be your first order of business after you leave this conference. If we are to get the legislation we need, we have got to make our desires known to Congress; we have to get through to our Senators and Representatives—just as we have been trying to get through to them on the need for genuine tax reform. In short, we have got to generate some heat. There is no reason why every local union of the Steelworkers cannot communicate, by resolution or letter, their support of the Williams-O'Hara bill to their Senators and Congressman. If every delegate to this conference could make it the business of his local to produce

10 letters, or post cards, or telegrams from members of his local, that would mean thousands of communications hitting the offices of our Representatives in Washington.

This is what it takes. You know it as well as anyone. It cannot be done with speeches, or mirrors. It takes the same kind of fundamental political action that we try to practice at all levels of our Union. I feel certain that Director Schremp, his Department, his two associates, and the Safety Coordinators will follow through on the development of the kind of support we need—and need quickly—to get the Williams-O'Hara bill enacted into law. If your local can send a delegation to Washington to talk to your Senators and Congressman, fine. If it can't do it, it certainly can see that a delegation visits the Congressman or Senators when they are back in their home districts and states.

As I said at the beginning of my remarks, I am here today because I believe safety and health are priorities for our Union. I am here because I want to communicate this belief to you and to ask your help in providing our members with the safest and healthiest work conditions that are possible.

I am also hopeful that out of our new Department, under Director Schremp, with Marco and Adolph at his hand, and through the assistance of the Safety and Health Coordinators, through the help of all of you and your local unions, will come an aggressive membership education program. I say this about membership involvement because the job that we must do cannot be done by our new Safety and Health Department alone. It cannot be done by the Coordinators alone. It cannot be done by our staff representatives alone. It will take the concern and involvement of all of us.

I know that Director Schremp has a full agenda for this conference and that you are going to hear some stimulating suggestions from other speakers. So I will

conclude my remarks by expressing my appreciation for this opportunity to be with you today, and be a part of what I consider a most important conference, conveying to you the importance that your international officers attach to our hopes and plans in the field of safety and health in the months and years to come.

Thank you and best wishes for a most successful conference.

APPENDIX C

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE
STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17694

THARON RAWSON, *et al.*,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA,
Defendant,

and

Case No. 17741

BERNIECE JOHNSON, *et al.*,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA,
Defendant,

and

Case No. 17742

LAURA DUNBAR, *et al.*,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA,
Defendant,

and

Case No. 18222

MARY WOOD, *et al.*,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA,
Defendant.

ORDER IN RE: MOTION FOR SUMMARY JUDGMENT

The facts of these cases were outlined in this Court's June 30, 1981, memorandum opinion. Briefly, these cases arise out of a 1972 underground fire at a mine owned and operated by the Suhshine Mining Company. Ninety-one Sunshine Mining employees were killed in the fire. On March 12, 1973, four separate, but identical, complaints were filed in the Shoshone County District Court by individual widows of the deceased miners, on their behalf and on behalf of their minor children. The plaintiffs' complaints, as amended, allege the Steelworkers have engaged in negligence, gross negligence, fraud and constructive fraud in relation to the plaintiffs.

Much of plaintiffs' claims revolve around the collective bargaining agreement in force between the United States Steelworkers and Sunshine Mine at the time of the fire. The pertinent sections of the bargaining contract read:

> The company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparēl and other equipment necessary to protect employees from injury shall be provided by the company. . . .
>
> An employee who believes that he is being requires to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his assistant grievance committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) super-

visory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.

In the event the committee cannot agree, the employee involved may file a grievance. . . .

A safety committee consisting of three (3) employees designated by the Union and three (3) management members designated by the company shall be established. . . . The function of the safety committee shall be to advise the plant manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent with the company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objective set forth in section 1. . . .

In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the grievance procedure.

Plaintiffs contend the Union's representations leading up to the safety clause, the safety clause itself and the manner in which the Union conducted itself after inserting the safety clause in the collective bargaining agreement subjects the Union to liability.

The defendant has moved for summary judgment on each of the counts contained in the amended complaints.

The defendant makes a three-pronged attack which will be dealt with serially.

A. FRAUD

The amended complaint alleges the defendant made the following representations to its members, the rank-and-file of the Union:

> A. That it was a competent organization for protecting the welfare, safety and interests of its members, and had a concern for said welfare, safety and interest of its members.
>
> B. That it has a reliable degree of expertise in underground mining.
>
> C. That it would develop adequate programs of safety through its Union representatives for the benefit of its members, the rank-and-file of said Union.
>
> D. That it would provide constant Union representatives to participate in the inspection of the mine for safety and accident prevention.

The complaints go on to state these representations were false, material, relied upon by the rank-and-file members, plaintiffs' decedents were ignorant of the falsity of defendants' representations, the misrepresentations were a proximate cause of plaintiffs' decedents' untimely deaths and, in Count VII and VIII, that the defendant intended its members to act upon these misrepresentations.

The Union has moved for summary judgment asking the Court to dismiss Count V and VII on the basis the plaintiffs have failed to produce sufficient evidence of constructive or actual fraud. With this contention, the Court agrees.

The defendant sent the plaintiffs interrogatories requesting them to describe in detail the factual basis for their constructive fraud allegations. The plaintiffs responded by saying, "The complete answer to this inter-

rogatory must await the completion of the depositions [of Steelworker's employees and agents] . . . ." Plaintiffs failed to identify one witness, fact or one document which supported their fraud allegation.

When this Court allowed the Plaintiffs to amend their complaint specifically setting forth the actual and constructive fraud counts, this Court agreed with plaintiffs' assertion the fraud counts were nothing other than a basic clarification of the factual allegations contained in the original complaint which was filed in 1973. In other words, the plaintiffs have had ten years to discover the facts and witnesses which would support their misrepresentation claims. If the plaintiffs are unable to produce any witnesses or facts other than the bare allegations of their pleadings, the Court can only conclude they never will be able to produce them.

Likewise, the plaintiffs' depositions are devoid of any testimony which would support the plaintiffs' fraud claims. In Tharon Rawson's deposition starting at page 31, and in Berniece Johnson's deposition starting at page 21, they were questioned regarding the fraud counts. This line of questioning revealed nothing which would substantiate the fraud counts. The wives were able to remember discussions with their husbands regarding their work in the mine but only in a vague, general way, resulting in no testimony which would establish the prima facia elements of a fraud claim. Laura Dunbar testified she was divorced from the defendant, Mr. Rossiter, before he was a member of the Union and she had no information as to Mr. Rossiter's relationship with the Union. (Dunbar deposition, p. 20). Most importantly, these depositions fail to establish the individual decedents relied on any alleged representations the Union made, nor is there a single piece of testimony which would show the Union knew its representations were false and intended for plaintiffs to rely on these representations.

In contesting the motion for summary judgment, the plaintiffs have produced a number of documents which they say raise a question of fact as to their fraud claims. These documents include: the "Blue and Green books" (recommended safety and health programs), the International Union's Constitution and the Sunshine Mine/ Steelworkers Collective Bargaining Agreement. These documents are of little help to plaintiffs' fraud claims. In and of themselves, they do not show the plaintiffs relied on these papers or that the statements in these documents are false. Apparently plaintiffs have underlined certain sections in these documents they think are pertinent. One underlined section reads:

> It involves a sense of determination of all concerned to see that safety programs and legislation are effectively implemented.
>
> Health and safety programs are going to be made or broken at the plant level, by how well our local unions and their safety and health committees do their job, and by the involvement of our individual members.

Statements like this, and others the plaintiffs have chosen to emphasize, establish nothing; they are not even statements of fact.

In contrast to the meager record created by plaintiffs, the Steelworkers have submitted the affidavits of Local 5089 President Lavern Melton and International Union Staff Representative Larry Marshall. In his affidavit, Laverne Melton discussed the operation of the joint safety and health committee created pursuant to the bargaining agreement. As local president, Melton was responsible for making appointments to the committee when vacancies occurred.

> In exercising my authority to make the appointments, I was well aware that none of the rank-and-

file members of Local 5089 were mining engineers or had other professional degrees or other background that qualified them as experts in mine safety. This was also a matter of common knowledge among the membership of Local 5089. Because none of the rank-and-file members were experts in mine safety, I knew that in carrying out their activities the committee members could only be expected to rely on their common sense and practical knowledge from their experience as underground miners. . . .

Because Local 5089 was a relatively small organization that functioned informally, members knew who the safety committeemen were and what was going on in the mine with respect to safety and health issues. . . .

I never represented or stated at any membership meeting or on any other occasion that the Union had any expertise in mine safety generally or in mine ventilation or evacuation systems in particular or, further that the membership should rely on the Union to guarantee or insure that no hazardous conditions of employment would exist at the Sunshine Mine . . . I never recall any member of the local safety committee ever making any such statements or representations at a meeting or for that matter on any other occasion. Indeed, the underground miners (including myself) who comprised the large majority of the membership were well aware from their own daily firsthand experiences in the mine not only that the Union had no authority to correct safety hazards but also how dangerous an occupation it was and, as well, how difficult it was to get this company to eliminate the hazards we faced.

Pursuant to the collective bargaining agreement, the company was obligated to "provide a sufficient number of printed copies of th[e] contract to enable

each member of the local Union to secure a copy." (Art. IX, § 6). Each member had received a copy of the 1970 contract far in advance of May, 1972.

As noted, under the 1970 agreement, in any circumstances where the union safety committee members believed that a safety hazard existed which required abatement, their role under the agreement was limited to "advising with" and making "recommendations" to the plant manager "for his consideration." The Union had no authority to correct any safety hazard that it believed to exist and its recommendations were, by the express language of the agreement, subject to the final decision of the plant manager. The company retained the sole prerogative and the entire responsibility for determining what safety measures, if any, it would put into effect. (Based on my personal experience in dealing with the Sunshine management, I can state that this company was very difficult to budge; it closely guarded its managerial discretion and prerogatives —especially when a Union recommendation would require some substantial cost.)

When a motion for summary judgment is made and supported by affidavit an opposing party may not rest upon his pleadings but must respond by affidavit, deposition or interrogatory setting forth specific facts showing there is a genuine issue for trial. The plaintiffs have not submitted any evidence by deposition, affidavit or otherwise which would establish the plaintiffs' decedents relied on any alleged Union representations. The record is also bereft of evidence the defendant Union made misrepresentations of fact or that the defendant intended to defraud plaintiffs. On the other hand, the defendant has submitted testimony that the Union did not misrepresent its expertise; the Union members were aware the Union only acted in an advisory capacity and that the primary

responsibility for ensuring job safety lay with each individual Union member and the company. Summary judgment is granted defendant dismissing the fraud counts in plaintiffs' amended complaints.

B. DUTY

Plaintiffs seek to hold the Union responsible on negligence theories. A fundamental component of a negligence claim is the existence of a duty toward another. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975). A duty is a standard of conduct to which the defendant is required to conform. *Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). Plaintiffs rely on the collective bargaining agreement and RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A (1965), as the sources for the legal duty owed by defendant Steelworkers.

A breach of contract is not in and of itself a tort. A contract may, however, create a situation which furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of care in the performance of those services. "The duty of care arises . . . irrespective of contract," and "[t]here must be a breach of duty apart from the non-performance of a contract." *Taylor v. Herbold*, 94 Idaho 133, 484 P.2d 664 (1971). Mere failure to carry out contractual obligations cannot support a tort action while misfeasance in the performance of contract obligations may support a tort action.

Plaintiffs complain the Union "failed to develop an adequate program for inspection and for safety, . . . failed to inspect," and "failed to require other safety devices to be used." Clearly the plaintiffs are upset with what the Union did not do, not with what it did do. Nonperformance of alleged contractual duties will not sustain a tort claim.

The "Good Samaritan Doctrine" is enunciated in RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A. Section 324A reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for the physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> (A) his failure to exercise reasonable care increases the risk of such harm, or
>
> (B) he has undertaken to perform a duty owed by the other to the third person, or
>
> (C) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Section 232 is substantially the same as 324A except it deals with the situation where an individual undertakes to render services directly to another person.

We start with the premise there is no duty to be a good Samaritan. The law will only hold a defendant liable if the plaintiff can meet the criteria layed down by RESTATEMENT. This Court has already held there is no proof the plaintiffs' decedents relied on the Union's safety activities. Therefore, the third possible criteria, that the harm is suffered because of reliance of the third person upon the undertaking, is not satisfied. Neither has the first criteria, i.e., the failure to exercise reasonable care increased the risk of harm, been met.

In *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1978), the plaintiffs sued over the death of Roberto Clemente and two other passengers and crewmen in a private airplane crash. The plaintiffs alleged Federal Aviation Administration employees had acted negligently

in failing to warn Clemente and other passengers the airplane was overweight and lacked a proper flight crew. The FAA had promulgated an internal order saying, "clear indication of alleged illegal flights should be made known to flight crew and persons chartering the service."

The appeals court held the defendant United States could not be held liable on the Good Samaritan theory.

> While the Federal Aviation Act empowered the administrative staff on the FAA to issue an order such as SO8430.20C, the act itself does not require this conduct. The agency, in issuing the order, was acting entirely gratuitously and was under no obligation or duty to plaintiffs' decedents or any other passengers.
>
> [T]he *Restatement of Torts (Second)*, §§ 323 and 324A n7 makes it clear that liability in such a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from his reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm. . . . There was no underlying statutory duty to offer special protection to plaintiffs' decedents; the failure to inspect *in no way added to the risk* of injury to the passengers or crew; and there is no evidence that anyone relied on the contents of SO8430.20C and limited their own safety precautions accordingly. (emphasis supplied).

Like *Clemente*, the Union's alleged failure to inspect, warn and make safe did not increase the danger to the miners beyond that under which they were operating. The Steelworkers may not have helped the miners' safety problems, but they did not augment them either. See also *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978). The Court notes the case at bar is also akin to the *Clemente* case in that there is no evidence the rank-

and-file Union members limited their own safety precautions because of Union activities.

Lastly, the defendant did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly places the responsibility for making the work place safe upon Sunshine Mine.

> The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. . . .
>
> . . . Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent *with the company's responsibility to provide for the safety and health of its employees* during the working hours of their employment and the mutual objectives set forth in section 1. (emphasis supplied).

The collective bargaining agreement makes it very clear the primary responsibility for the rank-and-file members' safety and health was placed upon the company as opposed to the Union which could only act in an advisory capacity. The Union could talk all it wanted to but when it came right down to it, the Union was without authority to force any safety and health measure upon the company except in highly limited, and for our purposes here, irrelevant circumstances. Herein lies the central factor in this dispute. The technical requirements of the RESTATEMENT aside, it is fundamentally unfair to hold a party liable for a condition it did not create or worsen and which it had no jurisdiction to correct. Summary judgment is granted dismissing all of plaintiffs' negligence claims.

C. PRE-EMPTION

When this case was reviewed by the Idaho Supreme Court in *Dunbar v. United Steelworkers of America,* 100 Idaho 523, 602 P.2d 21 (1979), three justices joined in an opinion holding this action against the Steelworkers was not pre-empted by the National Labor Relations Act. The Union argued its only duty to those it represented was that of fair representation. The Supreme Court rejected this argument saying:

> If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status any more than if its conduct brought death to a non-union member.

The Supreme Court distinguished *Bryant v. United Mine Workers,* 467 F.2d 1 (6th Cir. 1972) *Cert. denied* 410 U.S. 930, 93 Sup.Ct. 1370, 35 L.Ed.2d 592 (1973), from the *Dunbar* case.

> *Bryant* was also a case in which suit was brought by survivors of miners killed in a mine disaster. There the survivors claimed that the union had breached a duty created by the collective bargaining agreement regarding mine safety. In *Bryant* the collective bargaining agreement stated that the union "may inspect any mine." In affirming that judgment in favor of the defendants, the Court of Appeals stated that "[t]he use of the permissive 'may' rather than the obligatory language in the clause clearly negatives the possibility that any duty was created." 467 F.2d at 5. As noted by the Federal District Court in *House,* the agreement in the case at bar uses the words "shall inspect. . . ."
>
> We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation

brought under the state's wrongful death statutes. See *Helton v. Hake*, 386 F. Supp. 1027 (W.D. Mo., 1974).

With all due respect, this Court must disagree with the Supreme Court's holding in *Dunbar* and ask that higher court to reconsider its previous holding.[1]

The majority of courts considering the pre-emption issue in factual cases similar to the one here, have held the action was pre-empted by Federal Labor Law. See *House v. Mine Safety Appliances Co.*, 417 F. Supp. 939 (D. Idaho 1976); *Bryant*, supra. *Condon v. United Steelworkers of America*, 683 F.2d 590 (1982), the latest in this line of cases, is indicative of the majority position. *Condon* dealt with a Steelworker member who had received severe burns on his welding job. The collective bargaining agreement between plaintiff's employer and the defendant Union established a safety committee to advise the employer concerning safety and health matters but not to handle grievances. Plaintiff sued the Union alleging the joint safety committee failed to ensure there was sufficient fire safety equipment, breaching its duty of care by negligently performing its responsibility to monitor safety conditions. Plaintiff Condon admitted that with regard to all Union obligations eminating from the collective bargaining agreement, the only duty the Union owed its members was that of fair representation. Condon contended the Union was liable under the Good Samaritan

[1] Justices Donaldson and McFadden concurred in an opinion written by Justice Bakes which said the factual background of the case was not developed enough to make a determination as to whether the wrongful death action against the respondent union was pre-empted by federal law or not. But Justice Donaldson also concurred in the opinion authored by Justice Shepard. This makes it difficult to understand exactly what a majority of the Court is saying. This Court has decided not to utilize the difference between the majority and concurring opinion as a basis for its pre-emption discussion, rather choosing to discuss the majority opinion written by Justice Shepard.

Doctrine, a duty arising independently of the Union's collective bargaining agreement obligations.

The appellate court rejected the plaintiff's argument, saying:

> The collective bargaining agreement cannot so cavalierly be pushed aside. Without the collective bargaining agreement, there would be neither a local union nor a union safety committee. State law in this area, of necessity operates in the penumbra of the National Labor Relations Act in federal law.

The *Condon* Court reasoned the plaintiff's cause of action flowed from the contractual obligations undertaken by the Union to benefit its members and their working conditions and their duties arose from and were governed by federal law. The case was distinguished from those cases where a tort action against a union has been permitted.

> [F]ederal law would pre-empt imposing [a state law duty] unless it could be shown to arise wholly outside the ambit of those obligations circumscribed by a union's duty of fair representation under the collective bargaining agreement; that is, unless it involved union activity that was peripheral to the concern of the applicable federal statutes and presented a tangential or remote potential conflict with the federal regulatory scheme. This exception has been applied to state law claims where the union has engaged in affirmative improper conduct independent of the collective bargaining agreement such as union's infliction of severe emotional distress on a member by its intentional and outrageous conduct, or malicious libel. *This is obviously not such a case.* (Citations omitted; emphasis supplied).

No matter how the plaintiffs couch their arguments, they are attempting to hold the defendant liable for conduct of an advisory safety committee created and defined by the collective bargaining agreement. The plaintiffs are complaining about the manner in which the Union carried

out the collective bargaining agreement, essentially saying the Union advisory committee should have done more. This is obviously a question of the Union's representational duties and these representational duties are governed by the National Labor Relations Act. Nothing could be more telling than the very documents the plaintiffs have used in opposing this motion for summary judgment. They have attached the first and second editions of a model safety and health program promulgated by the national Union. The "blue and green books" are negotiating guidelines, setting forth safety and health contract language the local negotiators may put into their contracts. The plaintiffs say the local collective bargaining agreement did not have as strong a safety and health clause as proposed by the "blue and green books." The plaintiffs are now suggesting the defendant should be held liable because it did not negotiate a better agreement at the collective bargaining table. What could be more clearly governed by federal labor law! The plaintiffs also rely on the collective bargaining agreement itself in contesting the summary judgment motion. This only illustrates once again, they are attempting to hold the defendant liable on the basis of its representational duties. This area is pre-empted by federal law and the facts of this case, like the facts of the *Condon* and *Bryant* cases, do not come under one of the recognized pre-emption exceptions.

This case does not involve a collective bargaining agreement whereby the Union assumed management safety responsibilities and therefore management's common law duties. In *Helton v. Hake*, 564 S.W.2d 313 (Mo. 1978), decided four years after *Helton v. Hake*, 386 F. Supp. 1027 (W.D. Mo. 1974), the collective bargaining agreement provided the union steward would ensure no work was done in the immediate area of high tension lines. The agreement distinctly said the employer was in no way responsible for the performance of these safety functions by the steward. Norman Helton was killed when he came

in contact with a high voltage power line, causing his electrocution. Plaintiff, decedent's wife, brought suit against the Union. The *Helton* Court first distinguished the *Bryant v. International Union U.M.W. of America* and *House v. Mine Safety Appliances Co.* cases. As noted by the Missouri Court of Appeals, both these cases dealt with situations where the Union acted in a safety advisory capacity:

> We can readily agree that when a union assumes only an advisory capacity with respect to safety and the enforcement of safety regulations so far as the union is concerned is limited only to the usual grievance machinery, then the union is carrying out purely a representative function on behalf of its members and should be limited in its responsibility to performing that representation in a fair and honest manner. . . .
>
> Here, however, the union has chosen to go far beyond a mere advisory status of representative capacity in the processing of grievances. Rather, it has taken for itself a managerial function, namely the full independent right to enforce safety requirements. With its demand for and successful acquisition of that management right, it must also accept the concommitant responsibility. Under the terms of this particular collective bargaining agreement, the safety responsibility assumed by the union is separate and distinct from the normal and usual duties of a purely representative nature such as those involved in the processing of grievances.

This Court could not agree more with the Missouri Appellate Court. When the Union takes actual authority for enforcing safety conditions on the work site away from management, it should be held responsible for breaches in a duty of care just as management would have been at common law. The defendant Union's collective bargaining agreement with Sunshine did not allow

the Union to enforce safety measures. The Sunshine/ Steelworkers' contract did say the Union "shall inspect" but the Union could do nothing but advise once it had been reported. Though the collective bargaining agreement uses the word "shall," the word "shall" is simply a red herring which in and of itself has no meaning when considered in the total context of the safety clause.[2] This case is therefore undistinguishable from the *House* and *Bryant* cases which the Missouri Court cites with approval and indistinguishable from the subsequent *Condon* case. The *Helton* case is a persuasive case and contrary to the position taken by the Idaho Supreme Court in 100 Idaho 523. This Court again respectfully requests the Supreme Court to re-examine its holding that this case is not pre-empted by federal labor law.

This case has wound its way around the legal system for eleven years on heartbreaking, but legally insufficient facts. It is time the long travail of both sides was ended. Summary judgment is granted the defendant dismissing plaintiffs' amended complaints. Counsel for defendant will prepare the Judgment. Each side will bear their own attorney's fees. Costs to defendant. IT IS SO ORDERED.

DATED this 1st day of Nov., 1983.

s/ Watt E. Prather
WATT E. PRATHER
District Judge

Copies to:

George H. Cohen
Wayne Fuller
Lloyd Webb
Robert J. Cartwright
Frederick Betts
Bruce O. Robinson
Kenneth Howard

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[2] Laverne Melton's affidavit is uncontroverted that the safety committee did indeed inspect various sections of the mine pursuant to the collective bargaining agreement.

APPENDIX D

1979 Opinion No. 126

IN THE SUPREME COURT OF THE STATE OF IDAHO

Coeur d'Alene October 1977 Term

Filed: Sep. 13, 1979

R. H. Young, Clerk

Nos. 12228, 12229, 12230 and 12231

LAURA DUNBAR, *et al*,
MARY WOOD, *et al*,
BERNICE JOHNSON, *et al*,
THARON RAWSON, *et al*,
Plaintiffs-Appellants,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants-Respondents.

Appeal from the District Court of the First Judicial District of the State of Idaho, Shoshone County. Honorable James G. Towles, District Judge.

Consolidated appeals from summary judgments in favor of defendants in wrongful death actions. *Affirmed* in part and *reversed* in part.

Bruce O. Robinson, Nampa; May, May, Sudweeks & Fuller, Twin Falls; Matthews & Lee, Boise; Thomas A.

Mitchell, Coeur d'Alene; Elie Rapaich, Lewiston; Cartwright, Saroyan, Martin & Sucherman, Inc., San Francisco, California; Philo, Maki, Cockrel, Robb, Spearman & Cooper, Detroit, Michigan; Burgess, Joyce, Prothero, Shelan & O'Leary, Butte, Montana; and Lloyd J. Webb, of Webb, Burton, Carlson & Pedersen, Twin Falls, for appellants.

Honorable Wayne L. Kidwell, Attorney General, State of Idaho; Peter C. Jenkins, Special Assistant Attorney General, State of Idaho; George H. Cohen, of Barr, Gottesman, Cohen & Peer, Washington, D.C.; Eberle, Berlin, Kading, Turnbow & Gillespie, Chtd., Boise; Wayne P. Fuller, of Fuller & Radke, Caldwell; Michael E. McNichols, Orofino; David L. Gore, Chicago, Illinois; Frederick V. Betts and Paul D. Carey, of Skeel, McKelvy, Henke, Evenseon & Betts, Seattle, Washington; and Kleiman, Cornfield & Feldman, Chicago, Illinois, for respondents.

SHEPARD, J.

These are appeals from orders of summary judgment entered by the trial court in favor of both defendants, the United Steelworkers of America and the State of Idaho. As to the State, the court held that the activity upon which plaintiffs base their claim fell within the discretionary act exception to the Idaho Tort Claims Act. I.C. § 6-904. As to the Union, the court held that plaintiff's claim was preempted by the federal regulation of labor law. Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). We affirm the trial court's order for summary judgment as to the State, but reverse the trial court's order of summary judgment as to the Union.

The Coeur d'Alene Mining District is located in northern Idaho near Kellogg and Wallace, Idaho. Therein are located a number of "hard rock" mines, the shafts in some of which extend 6,000 feet below the surface and some of which contain up to 125 miles of underground

tunnels and workings. The Sunshine Mine is one of such workings and is the largest producer of silver and antimony in the United States. On May 2, 1972, some 200 miners were at work in the mine when a fire broke out which claimed the lives of 91 of those workmen. Survivors of deceased miners brought these actions for wrongful death, which were consolidated for appeal.

I.

As to the Union, plaintiffs allege negligence on the part of the Union in that it undertook to act as accident prevention representative and enforcer of the "company-employees" agreement. It was asserted that the Union misrepresented its safety concern and expertise; that it failed to develop an adequate safety program for its members; that it undertook to inspect and enforce the accident prevention clauses of the company-employees contract and did so negligently in failing to require fire drills, personal protective equipment, adequate protection against spontaneous combustion, adequate emergency egress and failed to require evacuation on evidence of smoke.

For emphasis, we reiterate that this appeal is from the orders of summary judgment issued by the trial court solely on legal theories under which the character of the two defendants, the Union and the State, were held to bar plaintiff's recovery.

We begin our analysis with the argument advanced by the Union and adopted by the trial court, *i.e.*, the jurisdiction of the courts of Idaho to hear and adjudicate plaintiffs-appellants' claim against the Union is preempted and superseded by the pervasive federal regulation of labor law and that such matters are committed exclusively to the primary jurisdiction of the National Labor Relations Board.

In Ray v. Atlantic Ritchfield Co., 435 U.S. 151 (1978), it is stated:

> "The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be susperseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 435 U.S. at 157.

Quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The preemption of state law or of state court jurisdiction is not to be readily inferred. Malone v. White Motor Corp., 435 U.S. 497 (1978).

The primary philosophy of the United States Supreme Court in the labor law preemption area was announced in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). There the Court said:

> "In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration. * * * We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes." 359 U.S. at 241-42.

In come cases the desire to avoid the conflicts delineated in *Garmon* has led the Court to declare that some matters are committed exclusively to the primary jurisdiction of the National Labor Relations Board, and states, and *a fortiori* state courts, are without jurisdiction to regulate or hear the disputes. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); San Diego Bldg. Trades Council v. Garmon, *supra*. In other cases, however, the Court has held that state courts have concurrent jurisdic-

tion. Vaca v. Sipes, 386 U.S. 171 (1967); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

A substantial factor as to whether state courts are ousted from all jurisdiction or share concurrent jurisdiction appears to be whether the activity involved is "arguably subject to paragraph 7, paragraph 8 of the [National Labor Relations] Act." San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 245. In *Garmon* the Court stated:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8 [29 U.S.C.A. § 158 (a)-(b)], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." 359 U.S. at 244.

That language continues to be viable and has been quoted on several occasions since *Garmon*. *See* Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977); Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n, *supra*; Motor Coach Employees v. Lockridge, *supra*.

It is the Union's position that the claims of plaintiffs-appellants are based on the breach of the duty of fair representation. Humphrey v. Moore, 375 U.S. 335

(1964). That being the case, the Unions argue, federal labor law must be applied even when the case is brought in state court. Vaca v. Sipes, 386 U.S. 171. The Union's argument continues that the plaintiffs-appellants must show that the Union discriminated against the deceased Union members in order to prove a breach of the duty of fair representation, Motor Coach Employees v. Lockridge, *supra*, and since the plaintiffs-appellants have not made such a showing, summary judgment was properly entered in favor of the Union. We disagree. Plaintiffs-appellants' claims are not necessarily based on the violation of the duty of fair representation and such is not the only duty owed by a union to its members. Further, we believe that even assuming the claims of plaintiffs-appellants fall within the general scope of the doctrine of preemption, nevertheless we deem it clear that the case also falls within the narrow exceptions to that same preemption doctrine which were described in Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977).

The duty of fair representation has never been carefully or precisely defined and its contours appear vague but, a fair summation of it is that it is designed "to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." Motor Coach Employees v. Lockridge, 403 U.S. at 301. *See* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 Tex. L. Rev. 1119 (1973); Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 Hastings L.J. 391 (1964).

In Steele v. Louisville & N. R.R., 323 U.S. 192 (1944), the Court held that the exclusive statutory agent of bargaining unit employees could not discriminate on the basis of race. The Court stated:

"Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. * * *

We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J.I. Case Co. v. Labor R. Board, [321 U.S. 332, 335], but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

323 U.S. at 201-03. *See* Vaca v. Sipes, *supra*; Wallace Corp. v. National Labor Relations Bd., 323 U.S. 248 (1944).

The duty of fair representation has been extended to other forms of arbitrary discrimination beyond that of race alone, but insofar as we are cited authority, the duty of fair representation retains its fundamental character as a protection against invidious discrimination by the majority of a bargaining unit against a minority. Motor Coach Employees v. Lockridge, *supra*; Humphrey v. Moore, *supra*. We are cited to no authority which indicates that the duty of fair representation encompasses or displaces those duties created by a state law which requires a person, corporation or an unincorporated association, to refrain from engaging in wrongful conduct which results in death or injury to person or property.

The Union here urges that the "only" duty owed by a union to those it represents is that of fair representation. We disagree. We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, *i.e.*, if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

The Union urges the application of the decision of House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976), decided by the United States District Court for Idaho, arising out of the same Sunshine Mine tragedy. That federal court relied in part upon the very trial court decision which is the subject of this appeal. We are not bound by the federal court's determination and its decision is, at best, only persuasive.

The court in *House* advanced another reason for its determination that the negligence action was preempted. It relied upon Bryant v. United Mine Workers, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973). *Bryant* was also a case in which suit was brought by survivors of miners killed in a mine disaster. There the survivors claimed that the union had breached a duty created by the collective bargaining agreement regarding mine safety. In *Bryant* the collective bargaining agreement stated that the union "may inspect any mine." In affirming that judgment in favor of the defendants, the Court of Appeals stated that "[t]he use of the permissive 'may' rather than obligatory language in the clause clearly negatives the possibility that any duty was to be created." 467 F.2d at 5. As noted by the federal district court in *House*, the agreement in the case at bar uses the words "shall inspect."

We hold that a material issue remains in existence in the case at bar regarding whether or not the Union had a duty to inspect and the alleged breach of duty. In the case at bar that question was never reached since the trial court held that the cause of action was preempted by the federal duty of fair representation. This case, therefore, is clearly distinguishable from *Bryant*.

We believe the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws and we ascertain no conflict which will necessarily arise between the state and federal authorities as a result of permitting such traditional litigation in the state courts. We are cited to no authority which would permit the National Labor Relations Board to take cognizance of wrongful death claims against unions. We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under state wrongful death statutes. *See* Helton v. Hake, 386 F. Supp. 1027 (W.D. Mo. 1974); W. Prosser, Law of Torts § 127 (4th ed. 1971).

We now turn to the assumption that preemption in a general term might apply notwithstanding the above discussion. We are of the opinion that even if the doctrine of preemption should apply in general terms, nevertheless this case falls within those exceptions to the doctrine of preemption previously announced by the United States Supreme Court. *See* Farmers v. United Brotherhood of Carpenters, 430 U.S. at 296-301. In *Farmers* a state claim was asserted by a union member against the union for the infliction of severe emotional distress by intentional and outrageous conduct. The Court in *Farmers* held that such was an exception to the preemption rule. Other activities which the Supreme Court has determined to be exceptions to the general preemption rule include malicious libel, Linn v. Plant Guard Workers, 383 U.S. 53 (1966); mass picketing and threats of violence, United Automobile Workers v. Russell, 356 U.S. 634 (1958); and wrongful expulsion from union membership, Machinists v. Gonzales, 356 U.S. 617 (1958). *See also* Sears Roebuck v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).

As noted in *Farmers*, exemptions or exceptions to the preemption doctrine should reflect an inquiry into the nature of the federal and state interest in regulation and the potential for interference with federal regulation or whether the potential for conflict with the federal scheme is "tangential and remote." Here the federal interest is tangential at best. And we see no possibility that the federal labor laws will be thwarted by requiring the Union to answer in state court to the claim that it wrongfully caused the death of these survivors' decedents.

We reverse the summary judgment of the district court as to the respondent Union and remand that portion of the cause for further proceedings.

II.

Plaintiffs' claims against the State of Idaho are brought under the provisions of I.C. § 6-904, which is

denominated the Idaho Tort Claims Act and is a legislative waiver of the State's otherwise sovereign immunity. It was and is the assertion of the State and summary judgment was granted the State on the basis that plaintiffs' claims were barred by that portion of I.C. § 6-904 which provides that the State shall not be liable for any claim arising out of or "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused."

At the time of the accident and the time of the filing of this action, the Idaho statutes provided for the office of Inspector of Mines for the State of Idaho. That official was required to visit each mine in the State of Idaho at least once each year for the purpose of determining the conditions as to safety and health and to promulgate reasonable rules and regulations for safety and health of employees therein after consultation with the State Mine Safety Advisory Board. [Those statutes, I.C. § 47-101, *et seq.*, were repealed and the same duties essentially transferred to the Department of Labor and Industrial Services and the Director thereof. 1974 Idaho Sess. Laws, Chapters 39 and 119, now codified as I.C. §§ 44-101, *et seq.*] Those statutes also authorized the inspector to enter mines to inspect for compliance with safety regulations and to notify the operator thereof of any violations. The statute required the operator to correct conditions of noncompliance and failing to do so, the inspector might issue an order closing the mine or portions thereof. General sanctions could be applied for failure of compliance with such orders.

At the time of the fire, there was in effect, adopted December 1971 Minimum Safety Standards and Practices for the Mining and Mineral Industry. [Safety Code 5]. Portions of that Safety Code 5 relevant to our consideration here are:

Paragraph 2:3 of this code provides as follows:

"In this code numerous general expressions are used, such as safe, adequate, substantial, proper, etc., particularly in reference to safeguards. By such terms it is the intention to specify available articles and attainable conditions in accordance with good standard practice in the industry and to avoid makeshifts.

In the first instance the determination of what is reasonable, safe, adequate, substantial, etc., is the *prerogative* of the inspecting official. In making such determination, the inspector must consult and consider the standards fixed or approved by recognized authorities, or applicable Idaho State Safety Codes, which are not in conflict with the regulations set forth herein.

In cases of doubt or involving dispute, the advisory services of the State Inspector of Mines are available. Where time permits, approval by him of new or untried devices should be sought in advance." (Emphasis added.)

Regulation 2:4(A) reads as follows:

"When compliance with any of the provisions of this code appears impracticable or unreasonable the State Inspector of Mines may, upon application in writing, permit modifications of the requirements when protection substantially equivalent to that required by this code has been provided. Such application shall set forth in full detail the reasons for requesting such modification. Any modification granted shall be limited to the particular case covered by the application for modification. Authorization for modification shall be in writing and shall be on file at the property with respect to such modification as allowed. Any such modification shall be revocable after due and reasonable notice in writing to the employer."

Plaintiffs-appellants asserted liability of the State in that it "undertook, pursuant to the Idaho statutes, to inspect and enforce safety in the aforementioned mine and failed to enforce an elementary accident prevention program * * *" by failing to require fire drills, safety meetings, mine evacuation upon discovery of smoke, adequate personnel protective equipment and adequate emergency means of escape. Plaintiffs-appellants also asserted negligence in that the Governor allegedly failed to give adequate chief executive supervision and direction to the State Mine Inspector; that the Governor was negligent in approving the appointment of a mine inspector who lacked the necessary qualifications to adequately handle the office; that the mine inspector and his deputies were negligent in inspecting the mine in accordance with Safety Code 5 in the above and additional matters.

Upon motion therefor the district judge granted summary judgment in favor of the State holding that the acts alleged and asserted by plaintiffs-appellants fell within the purview of the discretionary act exemption to the Idaho Tort Claims Act.

That portion of the Idaho Tort Claims Act exempting from liability "a discretionary function or duty" has not been previously construed by this Court. That language, however, was clearly adopted from the federal Tort Claims Act, 28 U.S.C. § 2680(a) (1970). The interpretation and construction of a federal act by federal courts, while not binding, is persuasive. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply Co., 98 Idaho 495, 567 P.2d 1246 (1977); State v. Miles, 97 Idaho 396, 545 P.2d 484 (1976).

The first significant interpretation of the discretionary act exemption under the federal statute was announced in Dalehite v. United States, 346 U.S. 15 (1953). That case arose from a fire and explosion in a Texas port which killed more than 500 persons. The disaster resulted from a federal government decision to produce and

export a highly volatile fertilizer. The Court interpreted the legislative history of the act and concluded that the government should not be subject to liability arising from acts of a governmental nature or function. The Court further said:

> "It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." 346 U.S. at 35-36. (Footnote omitted.)

Three members of the Court dissented in *Dalehite*. Thus, with two members of the Court not participating, the decision resulted in a 4-3 split of the sitting members of the Court.

The majority opinion states "[S]ince no individual acts of negligence could be shown, the suits for damages that resulted necessarily predicated government liability on the participation of the United States in the manufacture and the transportation of FGAN [ammonium nitrate fertilizer]." 346 U.S. at 23. However, as pointed out, specific allegations of negligence on the part of the government were asserted by plaintiffs, *i.e.*, that the material was an inherently dangerous and hazardous explosive and fire hazard; that a coating rendered the material highly susceptible to fire or explosion; that the material was placed in bags which were easily ignited by contact with fire or by spontaneous combustion; that the material was packed at high degrees of temperature which rendered the material more susceptible to fire and

explosion; that said high temperature continued by reason of the method of packaging while the material was shipped; that the sacks of the material were not labeled or marked as explosive and as a fire hazard as required by the rules and regulations of the Interstate Commerce Commission; and that common carriers of the material were not advised of the dangerous nature and character of the material.

As well pointed out by the dissent, "The fertilizer had been manufactured in government-owned plants at the Government's order and to its specifications. It was being shipped at its direction as part of its program of foreign aid." 346 U.S. at 48 (Jackson, J., dissenting). Hence, we note that the manufacturing operation was operated and controlled by the government entity sought to be held liable, and the product resulting from said operation was placed into commerce by the government. Further, we note that the manufacture, packaging and shipping of a fertilizer product is not an activity completely foreign to the sector of private business as contrasted with a governmental activity for which there is no corollary in the private sector.

The majority opinion nevertheless comments on "the specific acts of negligence" and argues that each of the specific acts was the result of some "discretionary" determination and thus could not constitute negligence. With all respectful deference to our brethren on the high Bench, we suggest that such reasoning or terminology provides no realistic answer as to what constitutes a "discretionary function." It seeks to insulate the government from liability for specific acts of negligence by stating that the decision to be negligent or careful involves discretion, and hence the negligence is not actionable. Such treatment provides no answer to the question of whether a duty was owed which was breached and which resulted in damage to another.

As we deem well said by the dissent:

> "The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.
>
> The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper. Reading the discretionary exception as we do, in a way both workable and faithful to legislative intent, we would hold that the Government was liable under these circumstances." 346 U.S. at 60 (Jackson, J., dissenting).

In an appropriate case involving the Idaho Tort Claims Act, we would undoubtedly be constrained to agree with the dissenters in *Dalehite* on the basis that the manufacturing operation was carried out by the government and the product was the result of that manufacturing operation as was the packaging and the shipment and the placing of the product into the stream of commerce; the activity carried out by the government was "akin to those of a private manufacturer, contractor, or shipper." *Id.*

In what was perhaps dictum, the majority in *Dalehite* also held that an allegation of negligence on the part of the government in fighting the fires which resulted from the explosion did not support a cause of action, citing Feres v. United States, 340 U.S. 135 (1950).

A scant two years later the dissenters of *Dalehite* appear to have prevailed in Indian Towing Co. v. United States, 350 U.S. 61 (1955). There liability was sought to be imposed on the government for negligent failure to maintain a lighthouse with the result that a ship and barge went aground and were damaged. The Court in a relatively short opinion bottomed its opinion on the "Good Samaritan" theory and said:

> "The broad and just purpose which the statute [Tort Claims Act] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable * * *." 350 U.S. at 68.

The Court held neither *Feres* nor *Dalehite* applicable to the decision in *Indian Towing*, stating only, "The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case." 350 U.S. at 69 (footnote omitted.).

Again, with all deference, we cannot accept the rationable of the majority opinion in *Indian Towing*. While the activity or lack of activity which allegedly caused the damage involved a facility which was government owned and operated, we cannot agree that there is or could be a parallel between the government being held to the same liability as a private person since, as pointed out, all but the government are expressly prohibited from maintaining lighthouses.

With some language of the Court in *Indian Towing*, we are however, in total agreement, to-wit: that the "discretionary act" exemption to the Tort Claims Act invites the drawing of "distinction so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." 350 U.S. at 68.

Less than two years thereafter the Court by a 7-2 majority delivered an opinion in Rayonier, Inc. v. United States, 352 U.S. 315 (1957). There the United States owned certain land through which it permitted a railroad to operate, and as a result thereof a forest fire was ignited which was fought by forest service personnel. It was alleged that the fire was improperly controlled and thus damaged the plaintiffs. Although not clear, it is probable that those portions of *Dalehite* and *Feres* dealing with immunity from the negligence of firefighters were overruled. Again, we note that the facility involved was owned, controlled and operated by the government and the negligence which was the immediate cause of the damage without any intervening factors was that of government employees. As in *Indian Towing*, the Court in *Rayonier* made no substantial effort to define the scope of the "discretionary act" exemption to the Tort Claims Act, other than obviously negligent fighting of fires by government employees is not within the ambit of the exception.

It was said in the *Dalehite* dissent:

> "This is one of those cases that a judge is likely to leave by the same door through which he enters. As we have been told by a master of our craft, '*Some* theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent.' " 346 U.S. at 49 (Jackson, J., dissenting) (Footnote omitted).

So it is with our reading of those decisions of the United States Supreme Court in the area of "discretionary act exemption." We leave them no wiser and find no clear theory or philosophy as to the meaning or application of the "discretionary act" exemption to the Tort Claims Act which is common to the federal and Idaho legislation.

We have reviewed decisions of the lower federal courts dealing with the discretionary function as an exemption to liability otherwise imposed by the federal Tort Claims Act. Such review also fails to engender assistance in the areas of either legislative intent or policy guidelines.

Martin v. United States, 546 F.2d 1355 (9th Cir. 1976), was an action under the federal Tort Claims Act based on a death resulting from a grizzly bear attack in Yellowstone National Park. The Court therein concluded, as in *Dalehite*, that a decision as to the administration of the park area which might result in grizzly bears invading camp ground areas was a high level policy determination which fell at the planning level, rather than the operational level. The Court in *Martin* also found no credible evidence that the government had failed to warn of a dangerous condition, which appears to have been the sole possible source of liability of the government. Such may explain in part that court's willingness to find that the government's activities were at the planning level, therefore discretionary and therefore exempt from the tort claims coverage. Nevertheless, we would undoubtedly disagree with that court's finding as it relates to the discretionary function. Although Yellowstone Park is admittedly a vast expanse of land and animals, it is not substantially different in its nature than wild animal parks which might be operated by private persons or entities. The decedent might have been construed to be an invitee. Hence, we see no reason not to apply the same standard of care to the government as we would apply to such an enterprise operated by non-government persons. If in the context of the management of a privately owned business, we would undoubtedly hold that the fact that a decision was made by a high level corporate officer on the planning level, rather than by a relatively low level animal trainer employee in his day-to-day operations would be irrelevant. As to the existence of a duty between the owners or operators of a

facility and an invitee, we would undoubtedly hold for a plaintiff and the existence of a duty.

In contrast to *Martin*, less than one year later the same Ninth Circuit decided McGarry v. United States, 549 F.2d 587 (9th Cir. 1976). That claim resulted from the death of an employee of a company under contract with the government to drill exploratory holes on an Atomic Energy Commission test site. While so working, the equipment struck electrical wires and the employee was killed. It was there argued that the decision to install automatic reclosure on the electrical lines, which resulted in decedent's death, was a planning level decision, as contrasted with an operational decision, and, therefore, constituted a discretionary function, exempting liability under the Tort Claims Act. In *McGarry* the court noted, "We find no error in imposing this duty of care under the circumstances of this case. The power line was owned by the United States. It was to be contemplated that contractors would engage in work in its neighborhood, and the AEC here was aware of the location of the exploratory hole." 549 F.2d at 590. If presented with a *McGarry* situation, we would undoubtedly hold the government duty no different than that owed in the private sector. We would not be concerned with the level at which the decision might be made as to the operation of power lines, but rather whether there had been a breach of duty to persons who could reasonably be expected to be in the vicinity of a power line.

In J.H. Rutter Rex Manufacturing Co. v. United States, 515 F.2d 97 (5th Cir. 1975), suit was filed for damages resulting to the plaintiff by reason of an unreasonable delay by the National Labor Relations Board in closing a back pay labor dispute case. The court in a brief and cryptic opinion decided that the decision of the NLRB "clearly involved public policy considerations—balancing of various cost-benefit considerations to advance the public interest." 515 F.2d at 99. There could be

drawn from *Rutter* the seminal thread leading to argument that the government should not be liable as a result of activities for which there is no parallel in the private sector and Tort Claims Acts were designed to provide liability as to the government only when a comparable liability and duty would exist in the private sector. Such, however, is not expressly discussed in the *Rutter* opinion.

Smith v. United States, 375 F.2d 243 (5th Cir. 1967), was also a decision of the Fifth Circuit. Smith sat as a juror in a federal court civil rights damages suit. He alleged that as a result of his service on the jury and their verdict, civil rights groups conspired against his business and the picketing and boycott resulting therefrom destroyed his business. He alleged that the failure of the government to arrest and/or prosecute those persons for the crime of intimidation of a federal juror resulted in the accrual of a cause of action against the government. The court in *Smith* appears to reject the planning-operational dichotomy in determining whether the function performed is "discretionary" under the Tort Claims Act. The court said:

> "Cases under the Act therefore put courts to the question of what sorts of decisions can be classified as resulting from discretion within the meaning of § 2680(a). It is not a sufficient defense for the government merely to point out that some decision-making power was exercised by the official whose act was questioned. Answering these questions, a difficult process, is not aided by importation of the planning stage-operational stage standard as argued for by Smith. Such a distinction is specious. It may be a make weight in easy cases where of course it is not needed, but in difficult cases it proves to be another example of a distinction 'so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation.'" 375 F.2d at 246.

The Court in *Smith* implicitly appears to be saying that where certain functions of government have no parallel in the private sector "an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way which no private person could." (Jackson, J. dissenting in *Dalehite.*) The discretionary function exemption prevents the diffusion of governmental power into private hands. The Court in *Smith* went on to say:

> ". . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute.
>
> * * *
>
> The national wellbeing has been in the balance during the recent struggle for racial equality, of which the present action is a piece. The federal government's decisions concerning enforcement of its criminal statutes comprise a part of its pursuit of national policy. If the government could be held liable for prosecuting or failing to prosecute such a case, its choices in this area could quite conceivably be affected by such a suit. Thus, a policy decision of the federal government might be influenced by a plaintiff with no governmental responsibility." 375 F.2d at 247.

The case of United States v. DeCamp, 478 F.2d 1188 (9th Cir. 1973), is similar in some respects to McGarry v. United States, *supra*, however, with important distinctions. In *DeCamp* action was brought under the Tort Claims Act for a death occurring while decedent was the employee of a company under contract with the Army Corps of Engineers. He was a bull-dozer operator who was killed as a result of the absence of a canopy on the bulldozer which would otherwise have prevented his death. The court approved a lower court finding of non-negligence of the employer for failure to equip the tractor with a canopy. The court stated:

> "In California a private person would assume no tort duty by reaching this conclusion [not to equip tractors with canopies] and the government engineer cannot be held to a higher standard." 478 F.2d at 1193.

Although Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1975), was an action brought against federal officials rather than the United States Government, we deem the language to be indicative of the groping by the courts in interpreting the discretionary function exemption to the Tort Claims Act. There it was alleged that the federal officials had maintained a building in hazardous condition which led to a fire and caused the plaintiff's adjacent building to be destroyed. The court said:

> ". . . One source of guidance useful here, however, is the explanation of the discretionary-ministerial distinction developed in the context of the Federal Tort Claims Act. * * * Generally speaking, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if some degree of professional expert evaluation is required. [Citations omitted.] The key is whether the duty is mandatory, and whether the act complained of involved policy-making or judgment. For example, negligence in the construction of a government facility is nondiscretionary and subjects the Government to liability under the Federal Tort Claims Act. [Citations omitted.] On the other hand, the Government is not liable under the Federal Tort Claims Act for actions based on the exercise of discretion, even if that discretion is abused." 401 F. Supp. at 436.

One of the more often cited cases is Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), (*affirmed Per Curiam* 350 U.S. 907.) There it was alleged that negligent instructions given by air traffic con-

trollers who were federal employees resulted in the crash of a military plane and an airliner. The court recognized that the principal question presented was whether the United States had consented to be sued for negligence of its control tower employees in regulating air traffic. The court noted as follows:

> "The government insists that its tower operators perform governmental functions of a regulatory nature; that no private individual has such power of regulation; that therefore the Act does not permit suit based on negligent performance of their duties. The situation involved here, says the Government, when viewed in all the circumstances, 'cannot be equated to one which would predicate analogous private liability,' and so it is said the claims are excluded from the coverage of the Tort Claims Act." 221 F.2d at 73.

The court went on to point out that it saw no reason why a private individual could not construct an airport and operate a control tower much as operated in the instant case, and that such an individual would, of course, be liable for the negligence of privately employed tower operators. Therefore, when the United States assumed a role parallel to that of private persons, it is liable for its negligent acts and omissions. The Court in *Eastern Air Lines* had little problem in finding that if the question was controlled by an operational-planning distinction, the duties performed were operational and stated:

> "It is therefore our opinion that, if a Government tower man negligently clears two planes to land on the same runway at the same time, or is guilty of some other negligent act or omission in doing his work, the Government is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by the driver of a mail truck who, in exercising discretion as to how to drive,

negligently runs through a red traffic light." 221 F.2d at 79.

The case of Downs v. United States, 522 F.2d 990 (6th Cir. 1975), is virtually impossible to reconcile with the case of Smith v. United States, *supra*. In *Downs* the claims resulted from the hijacking of a small passenger airplane. FBI agents refused to allow refueling when the plane landed and shot out one of the aircraft's engines. The hijacker thereupon shot and killed the two occupants of the plane and then himself. The court affirmed the trial court holding that the actions of the FBI agents did not fall within the purview of the discretionary act exemption. The court rejected the planning level versus operational level analysis and stated:

> "We believe that the basic question concerning the exception is whether the judgments of a Government employee are of 'the nature and quality' which Congress intended to put beyond judicial review. [Citations omitted.] Congress intended 'discretionary functions' to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged. We agree with a commentator's analysis of the provision:
>
> > It would seem that the justifications for the exception do not necessitate a broader application than to those decisions which are arrived at through an administrator's exercise of a quasi-legislative or quasi-judicial function. [Developments in the law-remedies against the United States and its officials. 70 Harv. L. Rev. 827 (1957).]

The court further stated:

> "The proper approach is to consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious

> conduct. * * * The prospect of government liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweighs whatever slight effect vicarious government liability might have on law enforcement efforts." 522 F.2d at 998.

We suggest that the Court's characterization of the actions of the government employees in *Downs* as being tortious dictates the result which is to be achieved by balancing the interest of individuals which have sustained damages as against the possibility of inhibition of governmental activity. We suggest that such a balancing test sheds no light on whether or not a duty existed running from the government to the injured citizens, the violation of which resulted in the legal determination that a "tort" had been committed which could result in liability.

The case of Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974), is a case frequently cited in this field. That action involved the claim of a woman who became a quadriplegic as a result of ingesting live virus polio vaccine. An action had been brought against the pharmaceutical manufacturer and settled prior to the Griffin claim against the government. It was alleged that the Division of Biologic Standards of HEW had subjected the polio vaccine to testing for safety in potency and approved it for release to the public in a manner inconsistent with and in violation of agency regulations. It was argued that the ingested vaccine was in a lot which was tested and found to exceed the permissible levels of neurovirulence. That lot of vaccine was, nevertheless, released and approved because the agency reasoned that the unfavorable test results were not produced by defects in the vaccine sample tested, but rather the product of unusual characteristics of the particular monkeys innoculated with the vaccine. Such theory of "biological variation" resulted in discounting or disregarding as not sig-

nificant what otherwise appeared to be excessive neurovirulence. The Court said:

> "The fact that judgments of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from examination of courts by classifying them as discretionary functions under the Act. * * * This court is fully capable of scrutinizing the processes and conclusions of the decisionmaker by the usual standards applied to cases of professional negligence." At 1066-67.

The majority opinion in *Griffin* concludes its discussion of the discretionary act exemption by stating:

> "Liability, in such cases, is predicated not on a negligent or unwise policy determination, but on the failure of Government employees to conform to and act consistently with the authority delegated. We do not hold that the Government may be liable for policy determinations made by its officials. Rather, we hold only that the Government may be liable where its employees, in carrying out their duties, fail to conform to pre-existing statutory and regulatory requirements." At 1069.

The dissenting opinion points out that the decision of the agency to release the vaccine may well have resulted from the exercise of a discretion permitted within the scope of the agency regulation and, therefore, was not in violation as contended by the majority.

Nevertheless, *Griffin* appears, implicitly at least, to be based on the planning level-operational level standard since the majority virtually concedes that if the regulations governing the testing of the vaccine had been followed, such would constitute a planning level decision and fall within the discretionary function exemption. Of further interest in the *Griffin* decision is the court's

holding that Mahler v. United States, 306 F.2d 713 (3d Cir. 1962), is distinguishable *since Mahler was based on negligence.*

Again, we note that *Griffin* appears unconcerned with the concept of tortious liability, but rather the imposition of liability when the government fails in some degree in its efforts to protect its citizenry and society in general by regulating and circumscribing the conduct of those who offer products or services to society.

In First National Bank in Albuquerque v. United States, 552 F.2d 370 (10th Cir. 1977), plaintiffs relied on *Griffin.* The case involved the claim on behalf of four children who had eaten pork which had been fed grain treated with a mercury fungicide. The children permanently lost sight, speech, locomotion and use of hands. It was alleged that the government had inadequately tested and investigated the fungicide and failed to prohibit the use of the fungicide and failed to require labeling of the danger of food chain poisoning on the fungicide packaging.

The Court purports to agree with the *Griffin* case, however, it held that the discretionary function exception applied. The Court held that the labeling, warnings, precautions and directions for use required policy judgments in evaluating the adequacy of the labeling and thus involved only a generalized protection of the public safety. As to the government's authority to suspend or cancel the products registration, the Court said only:

> "Whether such discretion is exercised and possibly abused, or whether there is a failure to exercise the discretion, such acts or omissions related to the cancellation function are within the terms of the exception provided by § 2680(a)." At 377.

See also cases collected in Annot., 99 A.L.R.2d 1016 (1965).

Although the above review of decisions of the lower federal courts is not complete or exhaustive, we deem it sufficient to demonstrate a lack of coherent doctrine or rationale. We gain nothing by way of assistance to our analysis.

The decisions of the courts of our sister states likewise provide no guidance or assistance. Those decisions furnish nearly as many rationales and/or theories as there are jurisdictions.

In State v. Abbott, 498 P.2d 712 (Alas. 1972), the Alaska court held that a judgment against the state should be affirmed when the alleged negligence of the state was failure to adequately maintain a slippery highway during the winter time. That court concluded that such was within the ambit of an operational rather than a planning level decision and thus the state was not immune from liability under the discretionary act exception to the tort claims act. The same rationale was utilized in State v. I'Anson, 529 P.2d 188 (Alas. 1974), wherein it was alleged the state was negligent in failing to place warning signs and no passing zone striping on the highway, and the plaintiff sustained injury in a collision by reason thereof. In Adams v. State, 555 P.2d 235 (Alas. 1976), plaintiffs brought suit for death and injuries resulting from a fire in a hotel which had allegedly been negligently inspected and/or which the state and/or the municipality had negligently failed to close because of fire hazards. The Alaska court refused to apply the planning-operational dichotomy of *Dalehite*, but rather decided the case in favor of the plaintiff on "policy implications" and rejected the argument that such would be a wrongful intrusion by the judiciary into other branches of government. (*See*, however, the dissent of Conner, J. *See also* Alas. Stat. § 09.65.070(d)(1)(A), wherein claims against municipalities could not thereafter be based on the failure to inspect, discover a violation or abate a violation.) *See also* State v. Morris, 555 P.2d

1216 (Alas. 1976), wherein plaintiff was denied recovery against the state on the basis of immunity when the decedent fell from a bridge which his employer was constructing for the State of Alaska and the state had negligently failed to require the contractor to use safety equipment; and Jennings v. State, 566 P.2d 1304 (Alas. 1977), where the state was held immune from liability for the death of a school girl attempting to cross a highway and it was alleged that the state had been negligent in failing to provide a safe crossing point.

In Nerbun v. State, 506 P.2d 873 (Wash.App. 1973), action was brought against the state for wrongful death resulting from the alleged negligence of the state in failing to enforce safety standards. There the court in denying liability said:

> "We do not believe the legislature intended to impose an absolute duty upon the Department of Labor and Industries to insure a safe place for workmen to be employed. The most the legislature intended was that the Department prescribe safety standards and secure some reasonable compliance through spot check inspections. In this way the safety conditions for workmen in general would be improved. The relatively small staff provided for the Department is indication of this legislative intent. The situation is akin to those cases where a city is not held liable because the police department and its officers failed to enforce an ordinance." At 877.

In Loger v. Washington Timber Products, Inc., 509 P.2d 1009 (Wash.App. 1973), the *Nerbun* decision was approved, the discretionary act exemption was discussed and liability denied. *Loger* was also a claim against the state for alleged negligence in performing safety enforcement functions. Such impelled the court to discuss "where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins . . ." At 1013.

In Campbell v. City of Bellevue, 530 P.2d 234 (Wash. 1975), however, the liability of a municipality was upheld when an inspection disclosed a highly dangerous electrical condition on private property, but service to that property was not disconnected. Decedent was killed when she fell in a water body electrified by faulty wiring. Both *Nerbun* and *Loger* were distinguished on the basis that in *Campbell* an inspection had been carried out and the dangerous condition known by the municipality. It was further pointed out that if the state had been negligent in carrying out its duties, a state statute would have exempted it from liability. Nevertheless, the fact that a municipality attempted to exempt itself by ordinance was held not relevant.

In Walters v. Hampton, 543 P.2d 648 (Wash.App. 1975), the victim of a shooting brought an action against the city based on the negligence of the city in failing to protect him from a person with known proclivities for violence with firearms. The court held that the decision to prosecute was discretionary and thus fell within the exception to liability. The court said:

> "Furthermore, the amount of protection afforded by any individual police department is necessarily determined by the resources available to it. The determination of how these resources can most effectively be used is a legislative-executive decision. Were we to hold a police chief's failure to prosecute every alleged violation of a city ordinance exposes a municipality to civil liability in tort, we would be placing ourselves in a position of having to determine how limited police resources are to be allocated. [Citations omitted.] This is neither a traditional nor appropriate role for the courts to assume." At 651.

The above case should be contrasted with Mason v. Bitton, 534 P.2d 1360 (Wash. 1975). There a speeding automobile was being pursued by police when the driver,

at a speed of 140 miles per hour, lost control and collided with another vehicle killing himself and the occupants of the other vehicle. That court held that the decision to pursue was an operational decision, not falling within the discretionary function exemption to tort liability. Hence, liability could be placed on the state.

In our view, the acts would clearly fall within the police power and the court's holding a judicial invasion of the operations of another branch of government. Mason seems impossible to reconcile with that court's prior cases. It should be noted that the collision occurred between the pursued vehicle and an oncoming car. If the colliding vehicle had been that of the police, a different rule might be applicable. *See also* Halvorson v. Dahl, 574 P.2d 1190 (Wash. 1978), wherein the Washington court held that the plaintiff widow of decedent stated a claim against the city whose all ged negligence in enforcing the building and safety codes caused the death of decedent in a hotel fire. *But see* Georges v. Tudor, 556 P.2d 564 (Wash.App. 1976).

In Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967), plaintiff decedent was crushed by the partial collapse of a retail store and the city was named a defendant on the basis of alleged negligent performance of inspection of construction in progress and failing to discover the defect which caused the collapse. The court suggested that legislative and judicial discretion will not sustain municipal liability in tort, but such liability will be sustained in the case of executive or administrative activity. The court found that the activity complained of fell within executive or administrative activity, but nevertheless plaintiff could not recover since the city building inspector at the time he allegedly negligently performed the inspection "owed no duty to Mrs. Modlin in any way different from that owed to any other member of the public. Therefore, the city is not liable under the rule of respondeat superior." At 76. The court said

also, "We do not attempt to grapple with the question, much-litigated in other jurisdictions, but apparently not in Florida, whether the public officers are not immune from tort liability for injury resulting from their discretionary acts." *Id.*

See also the following cases of the Florida Court of Appeals: Dep't of Health & Rehabilitative Services v. McDougall, 359 So.2d 528 (Fla.App. 1978); Cheney v. Dade County, 353 So.2d 623 (Fla.App. 1977); Sapp v. City of Tallahassee, 348 So.2d 363 (Fla.App. 1977); Gordon v. City of West Palm Beach, 321 So.2d 78 (Fla.App. 1975); Florida First National Bank of Jacksonville v. City of Jacksonville, 310 So.2d 19 (Fla.App. 1975), *cert. denied* 339 So.2d 632 (Fla. 1976). All of such cases appear to have held that recovery was not allowed on the basis that the duty, if any owed by the governmental entity, was not to any individual person, but rather to the public in general.

In Coffey v. City of Milwaukee, 247 N.W.2d 132 (Wis. 1976), plaintiff brought action against the city and its building inspector to recover for fire damage allegedly caused by the building inspector's negligence in inspecting the premises for fire danger. The Wisconsin court repudiated the distinction between governmental and proprietary act and refused to follow the rationale of cases discussed in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967); Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158 (Minn. 1972); and Duran v. City of Tucson, 509 P.2d 1059 (Ariz. 1973). The court in *Coffey* held that the imposition of liability did not always flow from a finding of negligence and cause in fact but rather that the decision should rest on considerations of public policy. The court stated:

> "Thus, this court has held that even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy be-

cause: (1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) *allowance of recovery would enter a field that has no sensible or just stopping point.*" At 140. (Citations omitted; emphasis supplied.)

The court concluded:

"[T]he dispute here involves public policy considerations and requires the balancing of various policy factors in determining whether there is to be liability at all, and if so, the extent thereof. The instant case involves a complex issue of municipal tort liability arising out of the alleged negligence of a building inspector in carrying out fire inspections. The factual connections are so attenuated that a full trial should precede this court's determination of the policy considerations." At 140-41.

See Lifer v. Raymond, 259 N.W.2d 537 (Wis. 1977), wherein a guest passenger who had been injured in a one-car automobile accident brought an action against the road test examiner employed by the State Department of Transportation alleging that the examiner was negligent in granting the driver of the car a probationary driver's license because the driver was so grossly obese as to prevent her from exercising reasonable control over a motor vehicle. Therein liability was denied with the court holding that the determination of the examiner as to the ability of an applicant involved an exercise of judgment and discretion.

In Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158 (Minn. 1972), a fire had occurred in a motel injuring the four plaintiffs and it was alleged that the granting of the building permit for changes was in violation of the building code and hence the municipality was liable for negligence. The court held that since a building inspector acted exclusively for the benefit of the public, as distinguished from an individual, any individual who was injured by an alleged negligent performance of the building inspector does not have a cause of action.

See, however, Hansen v. City of St. Paul, 214 N.W.2d 346 (Minn. 1974). There the issues before the court were whether the municipality has committed a tort in permitting dogs known to be dangerous, vicious and impoundable to prowl uncontrolled upon the public sidewalks in a residential area. The court said, "[i]n so holding we are mindful that it may be claimed or believed this decision opens a Pandora's box with respect to municipal liability for other moving hazards upon the public streets and sidewalks, such as attacks upon pedestrians by public drunks or by persons committing violent or criminal acts." At 350. The court held that since the city had knowledge of the vicious dogs prowling the public sidewalks, such did not constitute a discretionary function and the municipality was therefore not immune from liability. *See also*, Lorshbough v. Township of Buzzle, 258 N.W.2d 96 (Minn. 1977). Therein a township which maintained a dump was held to have owed a duty of care to neighboring property owners who were damaged as a result of fire which started in the township dump.

In Motyka v. City of Amsterdam, 204 N.E.2d 635 (N.Y. Ct.App. 1965), the court dealt with a claim against a municipality as a result of a fire. The court held that liability would exist only, and such was not found, if a duty was found to use due care for the benefit of particular persons as distinguished from the duty

to the general public to supply adequate police or fire protection.

See also, however, Smullen v. City of New York, 320 N.Y.S.2d 19 (Ct.App. 1971), wherein liability was found when an inspector noted a violation of building codes when a trench had been over-excavated without bracing or shoring and the inspector had led decedent into a position of peril. The court held that the presence and approval of the inspector created a special relationship and, therefore, a duty to the particular individual decedent. *Motyka* was therefore distinguished. *See also* Florence v. Goldberg, 369 N.Y.S.2d 794 (S.Ct.App.Div. 1975), wherein it was held that a regulation relating to a school crossing guard resulted in a special duty to school children and that the municipality was therefore not exempt from liability. This case was affirmed by the New York Court of Appeals, 375 N.E.2d 763 (1978).

See, however, Klee v. State, 404 N.Y.S.2d 772 (Ct. Claims, 1976).

See also Bruno v. Codd, 396 N.Y.S.2d 974 (S.Ct. 1977), regarding an action brought against police officers, the probation department and family court on the ground that they had failed to protect and assist wives assaulted by husbands.

See also Stranger v. New York State Electric & Gas Corp., 268 N.Y.Supp.2d 214 (S.Ct., App.Div. 1966).

In Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971), a plaintiff had sued the municipality for damages when he was injured by stones thrown by a mob standing on a street corner. The court held that there was no duty owing an individual citizen from a municipality or its police force since there was no duty running to the plaintiff individually as distinguished from a member of the general public. *See also* Hannon v. Counihan, 369 N.E.2d 917 (Ill.App. 1977); and Dufrene v. Guarino, 343 So.2d 1097 (La.App. 1977).

In Duran v. City of Tucson, 509 P.2d 1059 (Ariz.App. 1973), the Arizona Court of Appeals held that when a plaintiff was injured as a result of fire which in turn allegedly resulted from the municipality's failure to annually inspect the premises of plaintiff's employer, no recovery could be had since, although the doctrine of governmental immunity has been abrogated, the only duty owed was to the public in general as contrasted with a duty to an individual.

In Grimm v. Arizona Bd. of Pardons and Parole, 564 P.2d 1227 (Ariz. 1977), the Arizona court held that the negligent release of a highly dangerous prisoner on parole by the parole board narrowed the otherwise public duty of the board to the decedent who was shot during a robbery by the parolee. The liability of the board of pardons was upheld by the court, stating, "Negligent performance of a duty voluntarily undertaken may be a basis for liability." At 1234. The court also stated, "While leaving intact the absolute judicial immunity enjoyed by participants in judicial proceedings, we now abolish the absolute immunity previously granted to public officials in their *discretionary functions.*" At 1283. (Emphasis supplied.) The first paragraph of the dissent of Hays, J., is worthy of quotation:

> "Beware, oh unsuspecting trial judge, that when your decision to place a felon on probation goes horribly awry, the majority of my brothers sitting in cloistered ivory tower call your action gross and subject you to the consequences thereof. I hasten to concede that the majority opinion does not say this but logic tells me that the discretionary acts of the parole board need no less protection than those of the sentencing judge. There may be boards or commissions, bastions of bureaucracy, which should not be accorded the protection of quasi-judicial immunity, but the parole board is hardly one of these." At 1237.

See, however, the later Arizona cases of Wesley v. State, 571 P.2d 1057 (Ariz.App. 1977), wherein it was held that the Department of Liquor Licenses had no duty to protect a patron of a bar, although the board had information of prior violence, and failed to revoke or suspend the license, and McGeorge v. City of Phoenix, 572 P.2d 100 (Ariz.App. 1977), where liability was denied against a municipality who failed to protect a vehicle owner against the known violent propensities of a neighboring property owner.

In 1961, the Supreme Court of California in Muskopf v. Corning Hospital Dist., 359 P.2d 457, abrogated the previous existing doctrine of governmental immunity for tort in California. The Court stated, "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." At 460. That decision was heavily relied upon in this Court's decision in Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970). The Court in *Muskopf*, speaking through Mr. Justice Traynor, went on to indicate, however, that abrogation of governmental immunity does not mean that the state is liable for all harms that result from its activities. "Both th. state and individuals are free to engage in many activities that result in harm to others so long as such activities *are not tortious.*" At 462. (Emphasis supplied.) The Court there attempted to distinguish between officials' negligent performance of ministerial duties (for which they could be held liable) and discretionary acts within the scope of their authority (for which they would not be held liable). The Court held that insofar as discretionary acts are concerned, the justification for not abolishing such immunity was the danger of diminishing the desire of public officials to carry out their duties. Quoting Learned Hand, J., In Gregolre v. Biddle, 177 F.2d 579 (2nd Cir. 1949).

Issued the same day as *Muscopf* was the case of Lipman v. Brisbane Elementary School Dist., 359 P.2d

465 (Cal. 1961). Therein it was alleged that the school trustees sought to discredit the school superintendent and force her from her position. The court held that the trustees were acting within the scope of their discretionary, as contrasted with ministerial, powers and were, therefore, within the continued immunity rule.

In 1963 the California legislature enacted a tort claims act and exempted from that legislative abolition of sovereign immunity "discretionary" actions. In 1968, in Johnson v. State, 447 P.2d 352 (Cal. 1968), the court had for consideration the claim that the California Youth Authority had acted negligently in allowing a 16 year old boy with homicidal tendencies and a background of violence and cruelty to be placed in the home of plaintiffs, who would act as foster parents. Plaintiffs thereafter suffered personal injuries by reason thereof. It was alleged that the State had a duty to warn of a foreseeable peril and had failed to do so.

The Court in *Johnson* attempted again to distinguish between an immune "discretionary" decision and an unprotected ministerial act. It used language such as:

> "[a]dmittedly, our interpretation will necessitate delicate decisions; the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to reexamine. Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policymaking which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." At 360-61.

Aside from the language above quoted, the California court failed to resolve the problem and "avoid this potential quagmire."

In McCorkle v. City of Los Angeles, 449 P.2d 453 (Cal. 1969), plaintiff was injured when, following an automobile accident, he and a city policeman were standing in an intersection where a previous accident had occurred and plaintiff was struck by an oncoming automobile. It was contended that the policeman's act in investigating the accident was "discretionary" and thus immune. The court found that while the police officer may have been exercising discretion in undertaking his investigation, the injury to plaintiff was not the result of that exercise of discretion, but rather resulted from the negligence of the officer which followed his exercise of discretion. Hence, the court found no immunity.

In Ramos v. County of Madera, 484 P.2d 93 (Cal. 1971), it was alleged that two families who were the recipients of public assistance were required to work as a condition to receiving further assistance. An action was brought seeking injunctive and declaratory relief on the basis that minors had been "wrongfully coerced to work." The court said:

> "The tortious acts complained of consist of coercing plaintiffs to work as a condition to receiving AFDC payments [contrary to various statutes] . . ." At 97.

The court stated:

> "[i]n *Johnson* we reviewed the semantic quicksand which had ensnared the concept of 'discretion' in an unyielding trap of incomprehensibility. We noted that discretionary acts have been defined as 'those wherein there is no hard and fast rule as to the course of conduct that one must or must not take.' [Citation omitted]) Finding the semantic distinctions between 'discretionary' and 'ministerial' inadequate as a method of deciding actual controversies,

> we followed our landmark precedent of Lipman v. Brisbane Elementary School Dist., *supra*, in concentrating on policy considerations relevant to the government claim of immunity. Discretionary activity, we held, is that related to basic policy decisions, or that activity sometimes characterized as the 'planning' as opposed to the 'operational' level of decision making." At 98-99.

The court continued,

> "We are satisfied that a public entity may be liable in tort pursuant to Government Code, section 815.6, where it knows or should know that its failure to exercise its duty to reasonably supervise employees will result in coercing others to violate state laws, and where such violation proximately results in an injury of the kind which the law was designed to prevent. Public entities have, inter alia, a mandatory duty to obey legislative enactments, of which the entities must conclusively be presumed to have knowledge. Public entities certainly have a mandatory duty not to coerce others—either by force or by a threatened withdrawal of life-sustaining aid—to *violate* state laws, whether or not the entity is specifically charged with enforcing that particular law. Nor does any employee have 'discretion' to coerce California citizens to break the law." At 100-01.

Hence, the court found that a cause of action had been stated and that the acts did not fall within the immune area.

In Baldwin v. State, 491 P.2d 1121 (Cal. 1972), plaintiff's vehicle was struck from the rear and knocked into another lane of traffic where it was struck head-on. The California statutes provided that there shall be no governmental liability for an injury caused by the plan or design of a construction of or improvement to public property where such plan or design has been approved in

advance of the construction or improvement by the legislative body. Such is similar to the Idaho statute. The court stated the question to be whether design immunity once having attached is perpetually effective regardless of any subsequent change of conditions. The court stated:

> "Having approved the plan or design, the governmental entity may not, ostrichlike, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard." At 1127.

Summary judgment in favor of the State was reversed.

In County of Sacramento v. Superior Court of Sacramento County, 503 P.2d 1382 (Cal. 1972), the real parties in interest sought damages for wrongful death resulting from a prisoner escaping from a jail maintained by the defendant. Liability was denied on the basis of statutory immunity from liability dealing with escaped prisoners. Plaintiffs contended that the act of leaving the jail door unlocked was not a discretionary act, but was ministerial in nature, but such argument was rejected by the court.

In H F H Ltd. v. Superior Court of Los Angeles County, 542 P.2d 237 (Cal. 1975), plaintiffs sought alternative remedies in the nature of inverse condemnation or for damages in tort by reason of the municipality's adoption of zoning plan which allegedly damaged plaintiff's property. The court, in holding no liability in the tort aspect of the action, cited the dissent of Jackson, J. in Dalehite v. United States, *supra*, stating, "Justice Jackson's mot expresses both a principal of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the un-

doing of the wrongful legislation, not in money damages awarded against the state." At 245.

In Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976), the California court took another major step. There a patient had confided to his therapist his intention to kill plaintiff's daughter. Although there was no relationship between the victim and the doctor, the court nevertheless held that a cause of action had been stated. The court, in so holding, stated:

> "In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in the case of a particular type, liability should be imposed for damage done. . . . The assertion that liability must . . . be denied because defendant bears no 'duty' to plaintiff 'begs the essential question—whether the plaintiff's interests are entitled to legal protection against defendant's conduct. . . . [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." At 342 (Citations omitted.)

Hence, the court held that plaintiff had stated a case for the therapist's negligent failure to warn the victim. The court held that although no special relationship existed between the victim and the therapist, there did exist between the killer and his therapist a relationship of patient and doctor. The court said, "[s]uch a relationship may support affirmative duties for the benefit of third persons." At 343. (The dissent points out the resulting problem of the breach of the physician-patient relationship, the inherent difficulty in a therapist forecasting the danger of violence, the necessity of confinement to prevent the danger and the risks to society in general of a rule which enlarges the numbers of the mentally ill required to be confined.) On the issue of the discretionary act exemption, the court simply held that since the rule laid

down was applicable to private therapists, the same must necessarily apply to and liability result toward every governmentally employed therapist.

In Sandborn v. Chronicle Publishing Co., 556 P.2d 764 (Cal. 1976), plaintiff brought an action for defamation against the City and County of San Francisco and its clerk. The clerk had been holding monies of the plaintiff which he released to plaintiff and explained the transaction to a newspaper reporter in terms unflattering to plaintiff. The court held that the activities of the clerk did not fall within the immunized discretionary act area stating, "A governmental officer's discussion with the public or press regarding the functioning of his office would seem, instead, to fall within the category of those routine, ministerial duties incident to the normal operations of that office." At 769.

In Morris v. County of Marin, 559 P.2d 606 (Cal. 1977), plaintiff, who was injured in the course of his employment and was unable to secure any workmen's compensation benefits because his employer was uninsured, brought suit against the county for its failure to require the employer, in obtaining a building permit, to file a certificate of workmen's compensation insurance. Although the statute provides that a public entity is not liable for injury caused by the issuance, denial, suspension or failure or refusal to issue or deny, suspend or revoke a permit, such did not deter the court from finding liability. The court said:

> "A public entity, of course, does not have authority to determine 'whether or not' to issue a permit when it only performs a ministerial, non-discretionary duty. In such cases the 'basic policy decision' has already been made at a different governmental level. . . . Thus, the statutory language itself suggests that the section's immunity attaches only to discretionary activities." At 613. (Citations omitted.)

The court stated, "[t]o reiterate, in the instant case, plaintiff seeks to impose liability on the county not for failure to discharge a discretionary governmental function, but rather for failure to perform a mandatory duty which the county could not in its discretion ignore." At 616.

We now return to a consideration of Idaho's court made and statutory law.

This Court in Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970), first held that the doctrine of sovereign immunity was not a valid defense in actions based on tortious acts of the state. We deem it clear that *Smith* did not create a new cause of action, but was rather the abolition of a total defense to an action in the traditional and orthodox field of tort liability. The Court stated:

> "Each of the three cases now before this Court presents an identical question; viz., whether or not the doctrine of sovereign immunity with regard to the tort liability of the State of Idaho is to be abolished.
>
> > 'An immunity * * * avoids liability in tort under all circumstances * * * it is conferred, not because of the particular facts, but because of the *status or position of the favored defendant*; *and it does not deny the tort, but the resulting liability*,' W. L. Prosser, Law of Torts, 996 (3d ed. 1964)." At 799.

The Court pointed out that it was irrational to deny recovery to a plaintiff who suffered personal injury because of negligent acts of the state when recovery would have been allowed if the defendant had been a private individual.

The Court set forth the standard of care required of the state in the maintenance of state highways, "it is our opinion that the standard should be similar to that owed by a private individual who is the owner or posses-

sor of land to an invitee." At 804. The Court then proceeded to lay out the specific standard of care placed upon the state, which is substantially the same as any other owner or possessor of land owes to an invitee.

Thereafter, our legislature in 1971 (1971 Idaho Sess. Laws Ch. 150) enacted the Idaho Tort Claims Act. The opening language of that legislation provided:

> "Waiving the defense of sovereign immunity of the state and its political subdivisions; providing that this act shall be known and cited as the 'Idaho Tort Claims Act'; providing definitions; providing liability of the state and its political subdivisions for their tortious conduct and providing for exceptions; providing exceptions to tort liability. . . ."

Section II(7) of that act (now codified as I.C. § 6-903(a)) provides that a governmental entity shall be liable for acts "where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho."

As we have indicated above, there is no uniformity of interpretation of such language by courts nor are there alternative interpretations from which we might select as persuasive that one interpretation most supported by logic and reason. Rather, we find a melange of decisions wherein reason at times seems to have flown out the window. At one extreme, we find decisions which appear to make a mockery out of the oft repeated maxim of Jackson, J. dissenting in *Dalehite*, that "it is not a tort for a government to govern." Decisions which under the guise of *tort* liability theory award damages for: a killing by a murderer while law enforcement officers were engaged in attempted crime prevention (Downs v. United States, *supra*); for death or injury perpetrated by a convicted felon whom penal officials believed was sufficiently rehabilitated to enter society (Grimm v. Arizona Board of Pardons, *supra*); welfare recipients being re-

quired to work (Ramos v. County of Madera, *supra*). At the other extreme, we have the decision of the highest court in the land in *Dalehite* denying recovery in a situation in which a private person would assuredly be held to liability, but the government is deemed immune solely because of the governmental official level at which a decision was made to endanger others.

Hence, although we may derive some scintilla of intent from the legislative language, we are left with the task of determining and enunciating policy. We hold that our legislature has intended that wherein tort liability would attach to a private person, a governmental entity engaging in the same conduct will be liable. We do not ascertain an intent to create a new cause of action against a governmental entity for its attempts to govern.

We postulate that if government is not able to govern, anarchy and chaos are the only alternatives. If government is to govern, persons must be selected to operate and implement the abstract notions of what government should do. If government is to perform the function of controlling the interrelationships between individual members of our society (admittedly an oversimplification), it must be able to provide standards of conduct whether they be called statutes, regulations, ordinances, ukases or decrees. With exceptions not applicable here, such functions of government have traditionally been seen as sacrosanct from invasion by the judicial branch.

Here we are faced with claims against the government relating to the governmental function of governing. There are not parallel functions in the private sector. We are essentially concerned with the abilities of officials, the enactment of regulations, and the enforcement of standards. A finding of liability for breach of those "duties" running to plaintiffs would result in the creation of a new cause of action which we deem not to be contemplated by our legislature, and foreign to traditional concepts of the law of torts.

We do not so find on the basis that the duty alleged runs only from the government to society at large, rather than to these particular and individual plaintiffs. We do not so find on the basis that the performance of governmental employees would be inhibited. We do not so find on the basis that there should be a distinction between decisions made by a cabinet officers, viz-a-viz, a governmental employee truck driver. Our decision today is bottomed on the allegation of plaintiffs' complaints. As a case of first impression in Idaho, we need go no further. Other cases on other days which present other problems of analysis are best left to be decided on a case by case basis. To the end that this not be misconstrued, we do not contemplate that liability under the Idaho Tort Claims Act will result only from damages resulting from automobile accidents. Hopefully, our marginal comments relating to other decisions from other jurisdictions will suffice in this regard.

The cause as it relates to the Union is reversed and remanded for further proceedings. The cause as it relates to the State is affirmed.

DONALDSON, C.J., and McFADDEN, J., concur.

BAKES, J., specially concurring in Part I:

In light of the decisions of the Supreme Court of the United States in Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, —— U.S. ——, 98 S.Ct. 1745 (1978), and Farmer v. Carpenters, Local 25, 430 U.S. 290, 97 S.Ct. 1056 (1977), I concur with the majority's ruling that the trial court erred in dismissing the appellants' wrongful death action against respondent United Steelworkers because of the preemption doctrine. An action for wrongful death is a creature of our state statutes, is of substantial local interest, and traditionally has been commited to the jurisdiction of the courts of the state. Moreover, this action for wrongful death is un-

likely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. Assertion of jurisdiction by the courts of this state over the appellants' action would appear to present no significant risk of undue interference with national labor policy.

Nevertheless, in both *Farmer* and *Sears, Roebuck*, the court ruled that the jurisdiction of the state courts and state tort law was not preempted, only after a careful scrutiny of the legal issues raised by the actions under state law—intentional infliction of emotional distress in *Farmer* and trespass in *Sears, Roebuck*. In the instant case the precise nature of the legal issues raised by the appellants' wrongful death action is not entirely clear at the present procedural posture of the case. Indeed, it has not yet been determined by either the trial court or this Court that the appellants' complaint in fact states a claim for relief in tort against the respondent union. *Cf.* Just's Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978) (ordinarily mere breach of contract not a tort); *see also* McAlvain v. General Ins. Co. of America, 97 Idaho 777, 554 P.2d 955 (1976); Taylor v. Herbold, 94 Idaho 133, 483 P.2d 664 (1971). That issue was not briefed in this appeal and so we do not reach it.

In my view a final decision whether the wrongful death action against the respondent union is preempted by federal labor laws must therefore await a full factual development of the legal issues raised under our state tort law.

DONALDSON, C.J., and McFADDEN, J., concur.

BISTLINE, J., concurring and dissenting.

I join the Court's opinion wherein it is held that summary judgment of dismissal in favor of the United Steelworkers should not have been granted. I am unable to agree that the State of Idaho was entitled to a dismissal

at the summary judgment stage of the action against it, and briefly state the reasons which in my view require that that cause, too, should be heard and determined on the merits.

In my view the deceased miners who entered the portals of Sunshine's mine not only had a right to rely upon the allegedly assumed duty of the union to inspect the conditions and practices prevalent in that mine, but equally had a right to rely upon the State's statutory obligation. The obvious question here is: Who, if not the State and if not the Union, had the obligation to assure the miners that they were not being subjected to dangerous working conditions and practices? An easy answer, of course, is that the miners could see for themselves the conditions and practices, and could, so to speak, stay out of the kitchen if they didn't like the heat. However, I think that most will agree that such philosophy no longer obtains in this country. These miners, with dependents to support, were not exactly free spirits who could simply leave a job, the conditions of which may have appeared unsafe. Whether or not they were aware of any dangerous existing conditions and practices, by reason of their daily exposure thereto, it is the widows and children of those deceased miners who are the plaintiffs in these statutory wrongful death actions, and their right to rely upon the defendants' fulfillment of their alleged obligations to look out for the safety of their fathers and husbands is no less than the right in the miners themselves.

It is claimed by the widows and children that the State of Idaho was negligent in regard to its obligation to inspect the mines and secure to the miners safe working conditions. The State of Idaho responds that the pertinent Idaho statutes and regulations imposed upon the Inspector of Mines and his deputies duties which were wholly "discretionary" in nature, and hence liability for negligence may be avoided by application of that section of the Idaho Tort Claims Act which exempts

the State from its negligence with respect to a discretionary function or duty on the part of the State or its employee.

The briefs are replete with lengthy citation of authority intended to light the way in concluding that the State's activity in mine safety was or was not a discretionary function, but the divergence of view is great, as might be expected. None of this case authority bears any close resemblance to the relationship we consider today—the assumed obligation of the State of Idaho for the safety of the man who works in the dark and unknown world below the surface of the earth.

The State in its brief, while decrying as mechanical an approach (by the widows and children), which would categorize and distinguish between that which is "operational" and that which is "planning level" in its turn would have us equate the mine inspector's duties with those of a building inspector. The State relies heavily on the Minnesota case of Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158 (Minn. 1972), urging upon us that that court held "that in order to recover plaintiffs had to show a breach of some duty owed to them in their individual capacities, and not merely a breach of some obligation *owed to the general public.*" For the same proposition the State cites and discusses Amato v. City of New York, 268 F.Supp. 705 (S.D.N.Y. 1967), Ivicevic v. City of Glendale, 549 P.2d 240 (Ariz. App. 1976), Delarosa v. State, 518 P.2d 582 (Ariz. App. 1974), Duran v. City of Tucson, 509 P.2d 1059 (Ariz. App. 1973), Hensley v. Seminole County, 268 So.2d 452 (Fla. Dist.Ct. App. 1972), Fiduccia v. Summit Hill Construction Co., 262 A.2d 920 (N.J. Dist.Ct. 1970), Evers v. Westerberg, 329 N.Y.S.2d 615 (App. Div. 1972), Whitney v. City of New York, 275 N.Y.S.2d 783 (App. Div. 1966), Stranger v. New York State Electric & Gas Corp., 268 N.Y.S.2d 214 (App. Div. 1966), Stubley v. Allison Realty Co., 108 N.Y.S. 759 (App. Div. 1908), Reid v. City of Niagara Falls, 216 N.Y.S.2d 850 (Sup.Ct. 1961), and

Lockwood v. Village of Buchanan, 182 N.Y.S.2d 754 (County Ct. 1959). Following its discussion of these cases the State declares that:

> "It is through the instrument of regulations and safety standards, inspections and compliance orders, that the State seeks to regulate safety and health conditions in mines, with the view of accommodating both the interests of the mine operators and workers. However, responsibility for the operations and control over mine facilities remains a private venture and not the direct responsibility of the State."

It seems quite clear to me that the concern of the State of Idaho with regard to the mines of this State has nothing whatever to do with the general public. It is equally clear that the responsibility of the mine owners to furnish a safe place in which to work, abrogated by the Workmen's Compensation Law insofar as civil liability is concerned, does not in any way lessen the duty of mine inspection which the State has assumed to carry out by reason of well-intended legislative enactment. A mine is not a public building. It is not a public place. There is nothing in this record which intimates that the families of these disaster victims ever had any access into that mine, or any right of access. In fact, other than that the legislature created in the mine inspector the power and authority to enter the mines of this state, it is doubted that he would have any greater access to those mines than that available to the public in general, which so far as appears is by invitation only.

It is also important to note that the provisions of I.C. § 47-104 (current version at I.C. § 44-109) are aimed, not at all at protecting the public against dangerous or insecure conditions, but "for the purpose of making said mine safe for the employees therein . . ."

Notwithstanding the foregoing, the State tells us in its brief that the duty imposed on the mine inspector "existed for the benefit of the public in general" and at

another place that the mine inspector's decisions are "of public safety" and his decision "involves a balancing of competing policy considerations, accommodating both the interests of the mine operators and workers."

Nothing which I read in the statutory enactments suggests in the least that the mine inspector was to make a policy judgment and perform a balancing act which will afford some measure of protection to the miners so long as it also accommodated the interests of capital. Quite the contrary, the policy determination had been made by the legislature. That determination was that miners were to be afforded the protection of government control examination and inspections so as to insure those miners safe working conditions and practices. That determination was that the State do this by a qualified person upon whom was conferred certain specified powers and authority—with concommitant obligations to those miners who were perceived by the legislature to be in need thereof.

The only issue before us is whether the action should have been terminated on motions for summary judgment. My vote is that it should not have been. That is not to say that each defendant might not be entitled to a judgment of involuntary dismissal when the evidence has all been presented, but until that has been done, neither this Court nor the trial court are in any position to rule as a matter of law that the widows and children of the deceased miners are without any claim for relief for the losses suffered allegedly by reason of the negligence of the defendants. Brown v. United States, 374 F.Supp. 723 (E.D. Ark. 1974), State of California v. United States, 151 F.Supp. 570 (N.D. Cal. 1957), Bulloch v. United States, 133 F.Supp. 885 (C.D. Utah 1955), Guy F. Atkinson Co. v. Merritt, Chapman, & Scott Corp., 126 F.Supp. 406 (N.D. Cal. 1954). What Justice Bakes has written in his concluding paragraph is appropriate to the motion of the State of Idaho as well as to the motion of the United Steelworkers.

APPENDIX E

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17694

THARON RAWSON, Individually and as Guardian ad Litem for her minor Children, SETH RAWSON and CINDY RAWSON, heirs of JOHN R. RAWSON, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 17741

BERNIECE JOHNSON, Individually, and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON, minor children; and CHRISTINE JOHNSON and DONALD JOHNSON, heirs of WAYNE LYLE JOHNSON, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
and STATE OF IDAHO,
Defendants.

Case No. 17742

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., her minor children, heirs of GLEN RAYMOND ROSSITER, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 18222

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
and STATE OF IDAHO,
Defendants.

MEMORANDUM DECISION AND ORDER

Defendant Union has moved to dismiss, or, in the alternative, for summary judgment, and the essential facts upon which the motion is based are not in dispute. The defendant Union was the duly designated collective bargaining agent for the hourly employees of the Sunshine mine and had entered into a union contract with Sunshine Mining Company, which contract, among other things, established a safety policy to be policed by a safety committee of the Union and provided for grievance procedures.

On May 2, 1972 a fire occurred underground in the Sunshine mine, resulting in the deaths of many of its employees, both salaried and hourly.

Plaintiffs' Complaints were brought under the Idaho Wrongful Death Statute and the Complaint alleges that the Union owed the plaintiffs decedent a duty of due care under Idaho law and that such duty was violated by performing its specified services negligently, having undertaken to act as accident prevention representative and enforcer of the company-Union agreement.

The Complaint further alleges that these negligent acts were jointly and severally a proximate cause of the deaths of the miners.

Defendant Union argues that the cause of action here concerned has been preempted by federal labor law and, hence, the State court has no jurisdiction to proceed to consider the question of negligent representation under basic tort principles.

It is apparent that the Union, under federal law, owes the duty of fair representation to its membership and that such duty includes the statutory obligation to serve the interest of all members without hostility or discrimination towards any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. It is further apparent that if this duty is violated that the Union would be subject to an unfair labor practice charge with the National Labor Relations Board or by commencement of a suit in a federal or state court. However, in whatever forum this question is presented, that is, a claim of inadequate representation, the federal law would govern the disposition of the claim on its merits.

Negligent performance of its contractual duties does not state a claim under federal law for breach of fair representation. Plaintiffs' Complaint is grounded solely

on recognized principles of tort law and the federal labor act does not recognize that responsibility of the Union in its representative capacity.

It would serve no useful purpose here to discuss the whys and wherefores of the national labor policy, but suffice it to say that federal labor law has preempted the field of union representation and its obligation to its membership and has elected to define the duties imposed on the Union, which does not include the field of negligence.

Under these circumstances, it would appear that defendant Union's Motion for Summary Judgment would be and the same is hereby granted and defendant Union be and it is hereby dismissed as a defendant in the above entitled actions.

BE IT SO ORDERED.

Dated at Wallace, Idaho this 29th day of January, 1976.

/s/ James G. Towles
JAMES G. TOWLES
District Judge

APPENDIX F

Excerpt from the Collective Bargaining Agreement
dated March 11, 1970, between the
Sunshine Mining Company
and the United Steelworkers of America

ARTICLE IX

SAFETY AND HEALTH

1. The Company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel, and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.

2. An employee who believes that he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.

In the event the Committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exercises his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

3. A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise with the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advices of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the

Plant Manager for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.

4. A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.

5. Two men shall be designated by the Union to accompany the Safety Engineer on tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The results of this tour shall be considered at the following Union-Management safety committee meeting.

6. In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the grievance procedure.